73-1052

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973
NO. 73-1052

LAWRENCE BUCKLEY,

Petitioner,

vs.

CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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TOPICAL INDEX

	Page
PETITION	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
I. Statements made in argument which do not interrupt a judicial proceeding are not punishable by contempt.	12
II. Affirmance of a conviction on fewer elements than the conviction was entered upon is a denial of due process.	19
III. The trial judge is required to refer the alleged contempt to another judge.	26
IV. Equal protection requires right to appeal and bail pending appeal.	32
CONCLUSION	37
APPENDICES	
A. Opinion Below	38
B. Commitment Order	66
C. Order Denying Rehearing	68
D. Statutory Provisions	69
E. Constitutional Questions	75

TABLE OF AUTHORITIES

	Page
Argersinger v. Hamlin, 407 U.S. 25	33
Bell v. Hongisto, 346 F. Supp. 1392	33
Bridges v. Calif., 314 U.S. 252, 263	24
Bouie v. Columbia, 378 U.S. 347, 353	26
Bruener Co. v. Bryant, 36 C. 2d 877	33
Edmunds v. Chang (D.C. Hawaii, 11-2-73, ___ F. Supp. ___.)	17
Edwards v. Calif., 314 U.S. 160, 171	32
Ferguson, In re, 5 C. 3d 25	5
Illinois v. Allen, 387 U.S. 337	34
Little, In re, 404 U.S. 553	16, 17, 18,
Mayberry v. Pennsylvania, 400 U.S. 455	26, 31
McKinney, In re, 70 Cal. 2d 8	21, 22, 23
Newbern, In re, 55 C. 2d 500	33
Nye v. United States, 313 U.S. 33, 45-48	15
Otis v. Superior Court, 148 Cal. 129	33
People v. Kuhlman, 118 Cal. 140	33
People v. Turner, 1 Cal. 152	35
Rinaldi v. Yeager, 384 U.S. 305	33
San Francisco Chronicle, In re, 1 C. 2d 630, 634	14
Shortridge, In re, 99 Cal. 526	14, 23, 24, 25
Taylor v. Hayes, No. 73-473	32

STATUTES

	Page
UNITED STATES CODES	
Title 18, § 401 (formerly 28 U.S.C. § 385)	15, 16, 17
Title 28, § 1257(3)	2, 16
CALIFORNIA STATUTES	
Code of Civil Procedure	
§ 177	21
§ 178	21
§ 1209	3, 24, 25
§ 1209(1)	13, 14, 19, 20
§ 1211	12
§ 1218	3, 22
§ 1219	22
§ 1222	3, 33
Penal Code	
§ 19	32
§ 19(a)	32
§ 166	3
§ 166(6)	22
§ 1272	3
§ 1272(2)	33
§ 1466	3
§ 1466(2)	32
Vehicle Code	
§ 42001(a)	32
§ 42001(b)	32

TABLE OF AUTHORITIES

STATUTES

Cases

Baumgartner v. Conklin, 407 U.S.

Bell v. Maryland, 378 U.S.

Bridges v. Calif., 314 U.S.

United States Codes

18, § 401 (formerly

Edmunds v. Chong

Edwards v. Carter, 436 U.S.

Federal Statutes

Ferguson, In re, 9 Cal. 3d 39,

Illinois v. Allen, 397 U.S.

Lytle, In re, 404 U.S.

Mayberry v. Pennsylvania,

McKinney, In re, 70 Cal.

Newbern, In re, 53 C. 2d

Nye v. United States, 313

Civil Procedure

Oaks v. Superior Court, 144

People v. Mahlman, 310 Cal.

People v. Turner, 1 Cal.

Pinaldi v. Yeager, 384

San Francisco Chronicle,

Shortridge, In re, 99 Cal.

Codes

Taylor v. Hayes, No. 73-874,

(a)

(d)

32

32

32

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lawrence Buckley, by his attorney, Keith C. Monroe, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The opinion of the California Supreme Court, entitled In re Buckley, is reported in 10 Cal. 3d 237, 110 Cal. Rptr. 121, and was filed on October 19, 1973. A copy of the opinion of the Court is appended to this petition, Appendix A, infra, pp. 38-65 . A copy of the order of the trial court adjudicating petitioner in contempt is appended to this petition. (Appendix B, infra, pp. 66-67.

JURISDICTION

The judgment of the California Supreme Court was entered on October 19, 1973. A petition for rehearing was filed and was denied by the Court in an order dated November 28, 1973. A copy of that order (Appendix C, infra, p. 68) is appended to this petition. The jurisdiction of this court is invoked under 28 U. S. Code § 1257(3).

QUESTIONS PRESENTED

1. Is a convicted contemnor denied due process by a summary conviction of contempt if the record fails to show that the conduct interrupted or tended to interrupt the judicial proceeding in which it occurred?

2. Does appellate affirmance on a theory which requires proof of fewer elements than that on which the trial court entered a conviction of summary contempt result in a denial of due process?

3. Under the circumstances of this case, was the trial judge required to refer the alleged contempt to another judge for adjudication?

4. In a state which by statute grants all minor offenders an appeal and bail pending appeal as of right, may one convicted of summary contempt be denied similar rights consistent with equal protection principles?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix D, infra, pp. 69 - 74 : §§ 1209, 1218 and 1222 of the Code of Civil Procedure of the State of California and §§ 166, 1272 and 1466 of the Penal Code of the State of California.

STATEMENT OF THE CASE

(NOTE: The point in the proceedings and the manner in which the constitutional questions involved were raised in the courts below are set forth in Appendix E, infra, pp. 75 - 88.)

Relevant proceedings in this case appear in five partial reporter's transcripts, which will be designated as follows:

I: People v. Malloy, 9-19-72, C-27896;
II: " " " 9-20-72 " , morning session;
III: " " " 9-20-72 C-27896, afternoon session;
IV: " " " 9-21-72 C-27896;
V: People v. Lebhar, 9-20-72, C-28346.

References to the record will be made by bracketed designation, referring first to the volume, followed by the page number. Thus, [III:10] refers to page 10 of the record of the afternoon session on September 20 in People v. Malloy.

During the course of trial of Charles Thomas Malloy before Judge Herlands, the petitioner called as a witness the Deputy District Attorney who was prosecuting the case. [1:1] A hearing was requested by the Deputy as to whether this should be

permitted. The request was granted and a hearing was held out of the presence of the jury.

The petitioner, on request, made a statement of what he considered to be some reasons for calling opposing counsel as a witness. The petitioner apparently believed that he had been interrupted in his presentation by the Respondent Court. [1:3] At that point the following colloquy took place:

> MR. BUCKLEY: The Court should let me finish my position so that the record is clear.
>
> THE COURT: I thought you had finished. I didn't know you went on forever.
>
> MR. BUCKLEY: The Court's persistent interruptions --
>
> THE COURT: Don't characterize my conduct as persistent interruptions or I'll cite you for contempt. Get on with your argument.
>
> MR. BUCKLEY: I lost my train of thought because of the Court's interruption. Would you read back the last sentence or so?
>
> (Record read and further argument presented.)

Shortly following this exchange the District Attorney entered the fray:

> MR. BRIAN: And I renew my objection. There's been no showing whatever that I have anything to offer in the case, and

I've learned by sad experience not to talk to Mr. Buckley in person, and I refuse to do it unless there's a witness present. I have nothing to offer this case. It's one of his cheap tricks. [I:3-4]

The petitioner then stated that he desired to call the District Attorney specifically to ask questions about statements which he believed one Willie Wisely, who was apparently a witness in the case, had made to the District Attorney. [1:6] The petitioner urged that if the witness had made oral statements to the District Attorney he would be entitled, on behalf of his client, to discover the content of those statements in the same manner he would be entitled to discover a written statement of a witness. In re Ferguson, 5 C. 3d 25, was cited by him in support of this contention. [I:8-9]

What turned out to be petitioner's motion to call the District Attorney as a witness was denied. [I:10] At that point, the following took place:

MR. BUCKLEY: I'll move the Court for a mistrial.

THE COURT: Denied.

MR. BUCKLEY: This Court obviously doesn't want to apply the law.

THE COURT: Stop insulting me and sit down. Don't tell me I don't want to apply the law. It's grossly insulting and this time I'm going to cite you for contempt. For grossly contemptuous behavior in impugning to this Court a

willful desire not to apply the law. It is highly insulting, highly untrue, and you're punished with five days in the Orange County Jail and a fine of five hundred dollars, the sentence to take effect upon the conclusion of thi trial. It will be stayed until the verdict is rendered in this case.

On the morning of the following day the following took place:

MR. BUCKLEY: Well, things come up, your Honor, and I don't know. I don't exactly remember it, but I don't have much question that this Court has questions about my credibility, ever since the first trial I tried here. I have only tried three trials in front of this Court. This is the third one. I think in terms of -- it appears from the defense, it's very difficult to restore my credibility in your Honor.

THE COURT: What you did yesterday certainly is not showing any effort to.

MR. BUCKLEY: Well, with respect to th comment I made yesterday, I apologize to the Court. That was a comment made perhaps in the heat of anger or combat and I do apologize, because I do respe this Court and the Court's legal knowledge, and I disagree with the Court, but I don't disrespect it.

THE COURT: I'll see whether that's ma in good faith by the manner in which y conduct yourself in the remainder of this trial.

MR. BUCKLEY: I'll do my best to suppo it. [II:3-4]

Later that day, but now in the Lebhar case, Judge Herlands made a number of statements on the record. The Malloy case had been brought to trial during a recess in the Lebhar case. Malloy was not in custody; both defendants in Lebhar were. The Lebhar case, although it does not appear from the record, had been recessed in mid-trial due to Mrs. Lebhar's giving birth to a baby. Thus, it was initially contemplated, over petitioner's obejction, that the Malloy case could be completed prior to the time that the Lebhar case would be ready to resume. [V:4] Against that background, the following statements were made:

JUDGE HERLANDS: This morning defense counsel -- I have tried over the express protest of defense counsel, which are on the record, to move this case along in a desperate attempt to stave off the result which I foresaw defense counsel pushing me into, namely, a conflict with Judge Crookshank in the trial of the Lebhar case. It was a -- if it were merely a contest of wills and determination and character, I feel I was up to Mr. Buckley. Unfortunately, I had a court staff to contend with, and their families, and the jurors, and I'd been quite willing to sacrifice myself in the interest of justice to get this case completed before today, but I felt I went as far as I could in making demands upon all the other persons involved in this trial. I tried to make the recesses as short as I could, but inevitably, at almost every recess, as the record will show, there were a series of motions which prevented me from getting the jury back in the ten minutes I allotted to them, and it usually ended up in a

half or three-quarters of an hour before I could get the jury back.

There were days when I could hardly get any testimony on before the jury. I tried lengthening the court day, again over the protest of counsel, which, of course, was -- I was completely thwarted in my efforts to get more testimony because counsel was late or gave me false excuses or gave me excuses which, while perhaps constituting contempt, maybe not, but in any event, they were insufficient and improper. On one instance yesterday when I wanted to reconvene at 1:45, for example, I was told by Mr. Buckley he couldn't be there at 1:45. He had to go to the jail to see his client. It just so happened I saw him sitting for a considerable period of time across the street here in front of the lawyer's office during the noon hour, and then about 15 or 20 minutes before 2:00 o'clock, I saw him walking down the street in front of the courthouse. Today I find out he never went to the jail yesterday at noon to see his client. He went with Mr. Malloy for lunch. They had some delay in Mr. Malloy finding his car. Ate lunch with Mr. Bovee, and he got back at 1:20, and it was too late to go over to the jail, and that's been the pattern of this case, and I cannot attribute it to anything but the cunning, shrewd and deliberate attempt to thwart me in an extraordinary effort to get this case concluded before the Lebhar case came up. And under those circumstances, I hate to be put into a conflict with Judge Crookshank, but I feel that under those circumstances, having called the jury in at 8:30 this morning

and then having been told by my clerk as a result of a phone call made to her by Mr. Buckley at 8:02 this morning, that he was arrested last night for drunk driving and couldn't be here on time at 8:30. And that's typical of what's happened. I feel that in view of all those circumstances, the delay is Mr. Buckley's. I feel that anybody who studies the record in my case will see that it's deliberate. It was designed to put me into this position and to prevent the trial of my case, knowing that the Lebhars were in custody, and that he would have an argument to make that he could stop the trial of my case. That's been his purpose all along. It's been his purpose from the very day he walked into my chambers, and insisted on a continuance. His purpose was to prevent this case from being completed. And I don't think it's in the interest of justice that that be done. I think my case ought to go to completion, the Lebhar case ought to trail it. We're a very short period of time away from concluding it.

* * *

Of course, the record will also show that I cited Mr. Buckley for contempt yesterday and his purported ap ology this morning. He accused me of willfully disobeying the law in order to help the prosecution to conduct an unfair trial in behalf of his client. I'd much rather be accused of stupidity than of malice.

Today Mr. Buckley was kind enough to say he respected my knowledge of the law, which only made the charge of willfully disobeying it all the more serious. Rather than expunging the contempt, it

poured salt on the wound, because with all my purported knowledge of the law, there would be even less excuse in Mr. Buckley's eyes for my disobedience of it. So I'm not concealing anything from Judge Crookshank. I've never fined or sentenced a lawyer for contempt in 13 years, and I've always said when I do there is going to be a good reason for it, and I'll go the whole way, and I did. And I'm prepared to do it again if a like occurrence occurs. [V:8-12]

During the afternoon session of September 20 in the Malloy case, the following exchange took place:

MR. BUCKLEY: Could I make an inquiry of the Court, your Honor? Is the Court going to -- the Court said when the verdict comes in sentence is to become effective.

THE COURT: Yes, sir. And when I finish today I'll give you formal notification of your right to file Notice of Appeal, and upon the --

MR. BUCKLEY: I don't think it's the right of appeal I have. I think it's certiorari, but what I would like to know is would the Court grant a stay pending a writ?

THE COURT: Well, I'll grant a stay upon the posting of bail. I think that's reasonable. You have bail as a matter of right, a misdemeanor offense. [III:8

By this point in the proceedings, tempers appear to have cooled, as indicated in the following exchange:

MR. BUCKLEY: If I take that on a writ, I'd like it on the merits. I'm advising the Court that's not going to hold up on a writ [referring to an earlier minute order]. That's not evidence, but the Court can do what it chooses. I feel it's my obligation to advise the Court.

THE COURT: I appreciate your help. [III:15]

The Court then indicated that nothing had happened since petitioner's apology on the morning of the 20th to make it believe that the apology was tendered in bad faith except that the Court had thought further about the language of the apology. [III:19] The Court then made it clear that it did not accept the apology even though the petitioner reaffirmed the sincerity thereof. [III:20]

Finally, on September 21st, the Respondent Court served on the petitioner its written order of commitment to which this petition is addressed. [IV:2] Upon service of the order, the petitioner was taken into custody. [IV:3] At that point the petitioner tendered a bail bond to the Court in the sum of $1,000.00, in accordance with the Court's earlier order. Upon tender of the bond, the Court indicated for the first time that it would not order release of the petitioner until such time as some proceeding was in fact filed in an appellate court to review the commitment.

Co-counsel with the petitioner on the Lebhar case, a Mr. Bovee, entered the proceeding at that point by offering to file a petition in an appellate court not

later than the close of business on the following day. [IV:5-6] The Court refused to stay the commitment even though this was the first time in the course of the proceedings that the Court had intimated that the filing in fact of such a petition would be required as a condition of release pending review.

REASONS FOR GRANTING THE WRIT

I. Punishment for a purported contempt which does not in fact interrupt or tend to interrupt a judicial proceeding may not be imposed consistent with due process.

A California trial court, as a jurisdictional foundation for summary imposition of punishment for contempt, must file an order reciting with particularity the facts which demonstrate that a legal contempt occurred. California Code of Civil Procedure § 1211; 10 C. 3d 247. The order filed by the trial court in this case reads, in material part:

> "On September 19, 1973, in the immediate presence and view of the Court, during proceedings in the above-entitled action, Lawrence Buckley, counsel for defendant, stated in open court that the Trial Court 'obviously does not want to apply the law.' . . .
>
> Such statement in effect accused the Trial Judge of lack of integrity, tended to interrupt the due course of the trial then in progress, and constituted contemptuous behavior."

It is undisputed that the remark quoted in the order was made in the course of a proceeding out of the presence of the jury. There is no evidence in the record to show that petitioner's remark in fact caused an interruption of the trial then in progress. The California Supreme Court implicitly concluded that there had been no interruption of the proceeding which could be attributed to petitioner (10 C. 3d 244, fn. 6), but then proceeded to hold that no finding need be made whether the remark tended to interrupt the proceeding since the contempt rested on non-statutory grounds. 10 C. 3d 248, fn. 14. As is pointed out in the next section of this petition, it must have come as quite a surprise to the trial judge to learn from the appellate opinion that his order had been based on non-statutory grounds.

The reason, according to the opinion of the California Supreme Court, that there was no need to determine whether the remark tended to interrupt the proceeding was that the remark was "contemptuous on its face". 10 C. 3d 250. Therefore, according to the court, it was not necessary for the conduct to come within the definition of contempt set forth in Code of Civil Procedure § 1209(1), which includes "tend[ing] to interrupt the due course of a trial or other judicial proceeding" as an element of the offense. The court stated:

> "The list [of statutory contempts in § 1209] is not exclusive, however, for the power of a court to punish by contempt an act which impugns its integrity exists independent of statute." 10 C. 3d 248, fn. 14.

California courts, according to the opinion, have an inherent contempt power which

"is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain [their] dignity, if not [their] very existence." 10 C. 3d 247-248.

The quoted statement is taken from In re Shortridge (1893) 99 Cal. 526. As is demonstrated in the next section of this petition, the Shortridge case does not support the proposition; indeed the contempt conviction involved in Shortridge was annulled simply because it did not come within the definitions of any subdivision of § 1209.

Had the California legislature purported to completely deprive its courts of summary contempt power by statute, that statute would clearly be unconstitutional. Indeed, the California legislature attempted, by an amendment to § 1209 passed in 1891, to deprive the California courts of power to punish out-of-court published contempts even though they actually interfered with court proceedings. The amendment of 1891, had it been upheld, [1] would have imposed an intolerable and impossible

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[1] The 1891 amendment was recognized as being unconstitutional almost from the time it was enacted. See In re San Francisco Chronicle (1934) 1 C. 2d 630, 634.

The amendment read: "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of

burden on the courts, for it would have permitted their proceedings to be upset, even halted by an intensive out-of-court publicity campaign. Thus, it seems clear that any court does indeed possess a power to impose necessary controls on the conduct of proceedings before it. However, the fact that the courts require power to control the proceedings before them does not deprive the legislature of the Congress, as the case may be, of the power to place reasonable limitations upon the exercise of the contempt power. This has been amply demonstrated by the federal courts, in which contempt proceedings have been controlled by statute for 142 years. See Nye v. United States (1941) 313 U. S. 33, 45-48; 18 U. S. C. § 401 (formerly 28 U. S. C. § 385).

The foregoing background focuses attention on the central question considered in this branch of the petition:

> Where a state legislature has enacted a comprehensive and reasonable statutory contempt scheme, may a state court nevertheless impose punishment for expressive conduct it considers contemptuous when the conduct does not come within the statutory definition of a punishable offense and there is no finding that the legislature exceeded the scope of its constitutional power.

This court has implicity answered the foregoing question in the negative in

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suchcourt unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings."

In re Little (1972) 404 U. S. 553. Little came before this Court on writ of certiorari. It therefore was a case in which a right, privilege, or immunity guaranteed by the Constitution had been impaired or denied. 28 U. S. C. § 1257(3). The North Carolina contempt statute involved in Little, [2] like the federal statute [3] and like the California statute, [4] required behavior which tended to interrupt the proceedings as an element of the offense. The statements uttered by the petitioner in Little, although not stated verbatim in the opinion, were to the effect that the court was biased, it had prejudged the case, and the petitioner was a political prisoner. 404 U. S. 554. Those statements, which were made in the presence of the jury, seem to go much further toward impugning the integrity of the trial judge than does the single nine-word statement uttered out of the presence of the jury in this case. Nevertheless, this Court in Little reversed the conviction on due process grounds, saying:

" 'It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying

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[2] "Disorderly ... or insolent behavior ... during the sitting of any court ... tending to interrupt its proceedings ..." 404 U. S. 555, fn.

[3] "Misbehavior ... in [the court's] presence or so near thereto as to obstruct the administration of justice." 18 U. S. C. § 401.

[4] Infra, p. 17.

on his court duties.' "
404 U. S. 556

This case is indistinguishable. Nine words were uttered in the course of an argument on a legal point. Those words can be interpreted as a statement of belief that the judge was biased; they are equally susceptible of interpretation as an inartfully worded expression of simple belief that the judge had made an erroneous ruling. They caused no interruption of the proceeding.

It seems apparent that if the California courts are possessed of an undefined and uncharted extra-statutory contempt power which rests on the necessity to control the tone of comments made in a legal argument, then the North Carolina courts should have had a similar "inherent" power which would have provided an independent non-federal basis for affirmance of the Little conviction. Thus, the fact that this Court exercised its certiorari jurisdiction in Little strongly suggests that a "tendency to interrupt the proceedings" is, in this context, a prerequisite to a constitutionally valid adjudication of contempt. [5]

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[5] The United States District Court for Hawaii, considering a habeas corpus petition brought by an attorney found summarily in contempt by a state court, has concluded that an "imminent threat to the administration of justice" must be shown. 18 U. S. C. § 401 is said to mark the outer limits of state contempt power. Edmunds v. Chang (D. C. Hawaii, 11-2-73) ___ F. Supp. ___.

It is, for the foregoing reasons, respectfully suggested that the judgment of the California Supreme Court is squarel in conflict with the Little holding and it therefore is in conflict with the federal Constitution. For those reasons, the Cour is asked to grant its writ of certiorari and place the case on its calendar for argument.

II. Appellate affirmance of a conviction of summary contempt on a common law theory which requires proof of fewer elements than the statutory basis upon which the trial court entered the conviction works a denial of due process.

The order of commitment upon which their case is based reads, in relevant part, as follows:

"Such statement in effect accused the trial judge of lack of integrity, tended to interrupt the due course of the trial then in progress and constituted contemptuous behavior." (Emphasis added.)

§ 1209(1) of the California Code of Civil Procedure reads as follows:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial

proceedings; ..." (Emphasis added.)

The California Supreme Court implicitly recognized in its opinion that the trial judge had framed the order of commitment under the provisions of § 1209(1):

> "[The commitment order recites], however, that the statement 'tended to interrupt the due course of the trial then in progress,' language almost identical with that found in subdivision 1 of § 1209 of the Code of Civil Procedure." 10 Cal. 3d 246.

The court then referred to a footnote which quoted the code subdivision verbatim. Despite this, the court went on to make the following observation in a subsequent footnote:

> "We note that the contempt order here states that petitioner's remark 'accused the trial judge of lack of integrity'. Such conduct, if supported by the record, may be punished by contempt under the general rule set forth in the text, supra. We need not consider whether the remark also tended to interrupt the due course of the trial, as the order alleges, so as to justify independent grounds for contempt under § 1209, subdivision 1." 10 Cal. 3d 248, fn. 14. (Emphasis added.)

The text to which the court refers as setting forth the "general rule" is apparently that portion holding that California courts have an inherent power to punish for contempt. 10 Cal. 3d 247-248. Although it is not clear from the opinion precisely what the source of this

inherent power may be, there is language suggesting that it finds its origin in the common law. [6] But if that is the source, the two cases upon which the court relied as authority do not appear to support the proposition.

First the court cited In re McKinney (1968) 70 Cal. 2d 8, 73 Cal. Rptr. 580, as authority for an "inherent contempt power". The statement appears in McKinney that a court has inherent power to punish contempts. 70 Cal. 2d 10. However, the sentence immediately following that statement is:

> "It does not, however, follow that the legislature may not place reasonable limitations on this inherent power." 70 Cal. 2d 11.

In fact, McKinney, who had been called as a witness in a criminal trial, had refused to answer questions on the ground that

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[6] California statutory law suggests that the provisions set forth in the Code of Civil Procedure are exclusive:

§ 177: "Every judicial officer shall have power:
1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;"
2. ...
§ 178: "For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this code." (Emphasis added.)

they would tend to incriminate him. The trial court ordered him to answer; he persisted in his refusal; whereupon the trial court found him in contempt and sentenced him to jail until he consented to answer.[7] Eight days after the trial in which McKinney was to testify had concluded, he was brought before the court and purportedly summarily found guilty of criminal contempt for his previous failure to answer. A sentence of six months imprisonment was imposed.[8] California law does not permit a summary adjudication of criminal contempt.[9]

However, the Attorney General urged in McKinney that California courts have an inherent power to impose an "adequate" sentence for direct contempt, despite the provisions of Code of Civil Procedure § 1218, which limits punishment for civil contempt to five days imprisonment or a fine of $500.00 or both.

The California Supreme Court rejected that contention and pointed out that the California statutory scheme authorizes a court to summarily imprison a contemnor until he performs an ordered act or until the conclusion of the judicial proceeding in which the act was

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[7] That sentence was summarily entered under Code of Civil Procedure § 1219: "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it ..."

[8] The second sentence was purportedly under California Penal Code § 166(6).

[9] McKinney, supra, 70 C. 2d 14, and cases cited there.

ordered. Alternatively, California statutes authorize summary imposition of the five day - $500.00 punishment. 70 Cal. 2d 12. After making these observations, the McKinney court held that those legislative limitations are reasonable, since they are reasonable they are valid, and since valid, they must be followed. The court stated:

"We have already concluded that the Superior Court has no 'inherent' power in these circumstances to punish petitioner." 70 Cal. 2d 14.

From the foregoing analysis, it is suggested that the McKinney case provides no support whatever for the conclusion reached by the California Supreme Court in this case; indeed, it would appear that the McKinney case is precisely 180 degrees contra to the proposition for which it was cited.

The California court also relied on In re Shortridge (1893) 99 Cal. 526, 34 Pac. 227. That case, like McKinney, also states that California courts possess an inherent contempt power. Despite that statement, analysis of Shortridge shows that it, like McKinney, did not apply any "inherent power" but indeed determined that the conduct involved did not come within a statutory classification and, for that reason, the contempt adjudication was in excess of the jurisdiction of the trial court. The conviction was annulled.

Shortridge was a newspaper publisher who attended a divorce trial being conducted in the Superior Court. The judge conducting that trial ordered that there

be no public report or publication of the character of the testimony given in the trial. Shortridge nevertheless published an account of the testimony and was promptly thereafter adjudged in contempt.

Shortly before Mr. Shortridge was held in contempt, the California Legislature had amended Code of Civil Procedure § 1209, to provide that an out-of-court publication was not punishable as a contempt even though it actually interfered with the proceedings of the court. Fn. 1, supra, p. 14. On its face, it seems apparent that the 1891 amendment, purporting to deprive the courts of power to control acts which might go so far as to completely stop court proceedings, would be unconstitutional as a legislative intrusion into powers which are essential to the existence of the courts. But that infirmity would rest not on the idea that the legislature had no power to act at all in the area, but would instead rest on the idea that the scope of its act was excessive in prohibiting a court from protecting its functioning even though a "substantial likelihood" of disabling the court might exist. Cf. Bridges v. California (1941) 314 U. S. 252, 263.

But the Shortridge court was for some reason reluctant to strike down the offensive act of the legislature. Rather, in a patent fiction, the court held that the 1891 amendment to § 1209 did not apply to the out-of-court publication by Mr. Shortridge. Having leaped that intellectual hurdle with tongue in cheek, the court went on to state:

"No authority has been found which

denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act - whether committed in or out of its presence - which tends to impede, embarass or obstruct the court in the discharge of its duties." 99 Cal. 532.

Thus, the Shortridge court concluded that the courts had jurisdiction, generally, to punish as contempts acts of the class committed by the publisher. Then, after this elaborate treasure hunt for a source of jurisdiction, the Shortridge court analyzed the conduct in terms of the statutory provisions of § 1209, found that it did not fit within any of the statute's categories, and concluded that the trial court had acted in excess of its jurisdiction. The conviction was annulled.

Shortridge, therefore, does not provide any support for the "inherent power" conviction of the petitioner in this case.

With that background, the fundamental question raised by this section of the petition is brought into focus:

May a summary conviction of contempt which was entered by the trial judge under a statutory enactment requiring proof of, (a) disorderly or insolent behavior, (b) toward the judge holding court which, (c) tends to interrupt the due course of a trial, be affirmed by an appellate court thereafter which does not or cannot find evidenciary support in the record for the third statutory element of the offense?

This Court has held that a defendant is denied due process, by analogy to the prohibition against ex post facto legislative enactments, by a decision of a state court of last resort which unforseeably expands the interpretation of a criminal statute so as to embrace conduct facially beyond the reach of the statute:

> "If a state legislature is barred by the Ex Post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. Columbia (1964) 378 U. S. 347, 353.

It is respectfully suggested that the judgment of the California Supreme Court in this case falls squarely within the rationale and the specific holding of Bouie. It is, for that reason, respectfully requested that the Court grant its writ of certiorari and place this case on calendar for oral argument.

III. The trial judge was required, under applicable due process concepts, to refer adjudication of the alleged contempts to another judge.

Mayberry v. Pennsylvania (1971) 400 U. S. 455, confirms the principle that when a judge has become "personally embroiled" with an attorney to the extent that the judge's objectivity and impartiality may be impaired, any alleged contempt committed before that judge should be referred to another judge for trial of the charge. Thus, under Mayberry the threshold question is whether

the affronted judge has become "personally embroiled." This appears to be largely a question of fact and a peculiarly difficult one inasmuch as it calls upon an appellate court to determine the state of mind of the trial judge. And to further complicate the matter, the conclusion of the appellate court necessarily will rest totally on circumstantial evidence since, if the trial judge recognized and conceded his personal involvement, that fact would insure reference to another judge at the trial level.

In the case at bar, it is suggested that certain uncontested facts which appear in the record lead inescapably to the conclusion that the trial judge, very possibly without his being consciously aware of the fact, had indeed become "embroiled" so as to no longer be objective and impartial as concerns the petitioner.

First, it is apparent that the trial judge was not, at the time of the alleged contempt, exercising that degree of control of the proceedings which lends itself to a reasoned and deliberate resolution of legal issues:

> MR. BUCKLEY: The Court should let me finish my position so that the record is clear.
>
> THE COURT: I thought you had finished. I didn't know you went on forever.
>
> - - -
>
> MR. BRIAN: And I renew my objection. There's been no showing whatever that I have anything to offer in the case, and I've learned by sad experience not to talk to Mr. Buckley in person, and I

refuse to do it unless there's a witness present.

I have nothing to offer in this case. I'm the prosecutor, and I refuse to take the stand. It's one of his cheap tricks.

[I:3-4]

Certainly there is cause for question when a judge premits an opposing attorney to make a not very veiled accusation that the defendant's attorney is a chronic liar.

However, little insight is gained by endlessly recounting the record at the time. Rather, since at this point the benefit of hindsight is available, the frame of mind of the trial court is perhaps made more clear by the remarks of the Court made the following day:

". . I'd been quite willing to sacrifice myself in the interest of justice to get this case completed ..."
". . I cannot attribute it to anything except the cunning, shrewd and deliberate attempt to thwart me in an extraordinary effort to get this case concluded ..."
"It's been his purpose from the very day he walked into my chambers, and insisted on a continuance. His purpose was to prevent this case from being completed."
[V:4]

On the morning following the alleged contempt, the petitioner had tendered his apology to the trial judge. 10 C. 3d 244, fn. 7. The apology, on the basis of the language thereof, seems by any common sense interpretation to be just exactly what the dissenting justices interpreted

it to be, "a modest effort to express contrition for having offended the court." 10 C. 3d 263.

The trial court at the time the apology was tendered seemed inclined to accept it at face value:

> "I'll see whether that's made in good faith by the manner in which you conduct yourself the remainder of this trial."

Yet, by the afternoon of the same day, nothing having happened other than the Court having thought further about the words of the apology, the trial judge concluded that the apology was intended to be a further insult. Only an "embroiled" mind could find an insult in,

> " . . . I do apologize, because I do respect this Court and the Court's legal knowledge, and I disagree with the Court, but I don't disrespect it." 10 C. 3d 244, fn. 7.

Finally, on the same day the petitioner inquired if the Court would grant a stay of the imprisonment ordered. The Court responded:

> "Well, I'll grant a stay upon the posting of bail. I think that's reasonable. You have bail as a matter of right, a misdemeanor offense." [10] [III:8-9]

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[10] As is pointed out in the next section, the offense is not classified as a misdemeanor under California statutes. Infra, p. 29. Had it been a misdemeanor, bail on appeal would have been

On the day following, the Court caused a commitment order to be served on the petitioner and thereupon ordered him taken immediately into custody. The petitioner tendered a bail bond for $1000.00 to the Court, the amount previously ordered. Nevertheless, the Court refused to stay the order of imprisonment because no appellate proceeding had then been commenced. The petitioner remained in jail until a petition for habeas corpus was filed in the California Supreme Court the next day.

Punishment for contempt must be supported by a written order, a commitment. 10 C. 3d 247. The commitment order, as explained by the lower court in its opinion must set forth the facts upon which the contempt is claimed to rest. Obviously, appellate proceedings commenced prior to receipt of a copy of that order would be analogous to an appeal undertaken while a jury deliberated. Thus, the assurance the previous day by the trial judge that a stay of imprisonment to permit appellate

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a matter of right. Since the judge erroneously termed it a misdemeanor, one cannot discount the possibility that the denial of a stay the following day rested simply on the judge's having discovered that it was not a misdemeanor and liberty pending review was not therefore mandatory. The fact, in the first place, of requiring monetary bail from an attorney practicing in that Court raises serious questions about the objectivity of the judge. The monetary bail requirement is all the more significant when it is recognized, as it was by the trial judge, that the County was indebted to the petitioner in an amount in excess of $500.00. [III:10-12]

review would be allowed takes on significance in this context when the objectivity and fair detatchment of the judge are questioned.

The requirement of appellate proceedings in fact in progress as a condition of staying the imprisonment was first mentioned at the time the order was served on the petitioner. Thus, the previous day's assurance of a stay was given on an unspoken and, in practical terms, impossible condition. No definite conclusion can be drawn from this circumstance, but it would seem to be a significant circumstance to be considered in determining whether the judge presented "the image of 'the impersonal authority of law.' " Mayberry, supra, 400 U. S. 465.

The California Supreme Court concluded that the language involved in this case was "insolent, offensive, insulting and impugned the integrity of the court." 10 C. 3d 250. And the foregoing is true as a matter of law, according to the opinion.

Yet, this same language, which impugned the integrity of the court as a matter of law,

> "... did not rise to the level of personal vilification which by itself would give evidence of the trial court's probable personal involvement." 10 C. 3d 256.

This would seem to be a "heads you lose - tails the judge wins" approach.

For the foregoing reasons, it is respectfully suggested that the actions

of the trial judge, under the circumstances, worked a denial of due process by reason of adjudication of the offense by the judge who considered himself a target of vilifying remarks and who was demonstrably "personally embroiled." [11] The Court is therefore respectfully requested to grant certiorari and place the case on calendar for argument.

IV. Except in cases where it can be and is demonstrated by the record that immediate punishment of a contemnor is necessary to the effective functioning of the court, equal protection concepts and practical logic demand that a stay of punishment be granted.

Under California statutory law, an appeal as of right may be taken from any non-felony conviction for which imprisonment may be imposed. Penal Code § 1466(2); see Edwards v. California (1941) 314 U. S. 160, 171. Appealable misdemeanors, and all are appealable, may be punished by fine limited to a maximum ranging from $50.00 up to $1000.00 and by a county jail sentence with maximums ranging from 5 days to as much as one year, [12] dependent on the particular offense. With a few exceptions, there are no minimum punishments

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11 This is apparently one of the issues on which the Court granted certiorari on December 3, 1973, in Taylor v. Hayes, No. 73-473.

12 See, e.g., Vehicle Code § 42001(b) and Penal Code §§ 19, 19(a), 272. Vehicle Code infractions are not appealable but imprisonment may not be imposed for an infraction. Vehicle Code § 42001(a).

for misdemeanors.

Liberty on bail pending appeal from a misdemeanor conviction is a matter of absolute right. Penal Code § 1272(2); In re Newbern (1961) 55 C. 2d 500, 11 Cal. Rptr. 547.

Equivalent avenues of appellate review must be available to all, free of unreasoned distinctions. Rinaldi v. Yeager (1966) 384 U. S. 305.

Offenses which involve the prospect of imprisonment should be accorded those constitutional protections necessary under the circumstances to assure fair treatment. Argersinger v. Hamlin (1972) 407 U. S. 25.

Appeal from a civil contempt conviction is not permitted. Code of Civil Procedure § 1222; People v. Kuhlman (1897) 118 Cal. 140, 50 Pac. 382. Review of a contempt conviction may be obtained on habeas corpus or certiorari. Bruener Co. v. Bryant (1951) 36 C. 2d 877, 229 P. 2d 356. But, review is limited to the question of jurisdiction. Otis v. Superior Court (1905) 148 Cal. 129, 82 Pac. 853. Obviously, a petition for an extraordinary writ, prepared, as the original one in this case was, while the jail clock ticked, is not the equivalent of an appeal and bail as of right. [13]

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13 The District Court for Northern California has concluded that the California civil contempt scheme is constitutionally infirm for this precise reason. Bell v. Hongisto (1972) 346 F. Supp. 1392.

Equal protection therefore requires that, in the absence of a specific finding by the trial court, supported by evidence in the record, that immediate punishment of a contemnor is necessary to effective functioning of the court, the trial court must grant a stay of any sentence of imprisonment pending appellate review of the conviction.

It is important to note what is not contended in this section of the petition. No contention is made that a judge in any way lacks power to control actual courtroom disruptions. No contention is made that a judge in any way lacks power to enforce reasonable standards of order. There undoubtedly are, and unfortunately will be, situations which are themselves extreme and which, quite properly, require extreme measures in order that the court proceedings may be carried out. This petition does not challenge or question Illinois v. Allen (1970) 397 U. S. 337. This petition is concerned with the situation, and only with the situation, where the record fails to show any necessity for immediate punishment for a past act. And on a record, such as this one, which contains no showing of necessity for immediate punishment, as distinguished from a necessity for immediate control, there would seem to be no basis whatever for denying an appeal and bail pending appeal to a convicted contemnor. If reason is lacking, then the different treatment is arbitrary and offensive to the Constitution.

On the practical side of the ledger, the record in this case illustrates with unusual clarity the potential virtue to the administration of justice that a

mandatory stay provision would bring about. There can be little question but what when the petitioner tendered his apology to the trial judge in this case, that the judge was strongly considering exonerating the contempt adjudication which had, indeed, come about during the heat of combat. Had the trial judge concluded that the apology was sincere, there seems little doubt that it would have been accepted and no appellate court would have heard of this case.

However, that was not to be the way of things in this unfortunate case. The trial judge, after giving further thought to the language of the apology, and apparently to nothing more (10 C. 3d 244-245, fn. 9), concluded that the language of apology had not been intended at all to express that intent, but had instead been intended to magnify and drive home what he had taken to be the original insult. [14] But had some event taken place at that time, or at any time prior to commencement of the sentence, which had conviced the trial judge that the apology was sincere, it seems reasonable to believe that the matter would have been at an end. Of

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14 This interpretation of the language of the apology cannot help but raise serious questions of what possible motive could have inspired one just convicted of contempt to consciously and calculatedly invite a second conviction. The decision, in practical effect, abandons the 123 year old apology doctrine (People v. Turner (1850) 1 Cal. 152), by holding that an apology, even if erroneously disregarded, does not affect the conviction.

course, no such event occurred and the case moved almost of its own momentum to imprisonment of the petitioner and to the filing of a petition in the appellate court. The avenues of explanation and understanding were, at that point, closed and barred. And they became closed and barred at a moment in time when both the petitioner and the trial judge were undoubtedly fatigued and spent from what was clearly a taxing and difficult trial.

If one assumes that the sentence of imprisonment in this case had been stayed for a short time, time enough for all concerned to regain the vitality and vigor which is one cost of a difficult trial, is it not likely that reaffirmation of petitioner's apology would have been made and would have been accepted? And had this come about, would not the system of justice have been the benefactor?

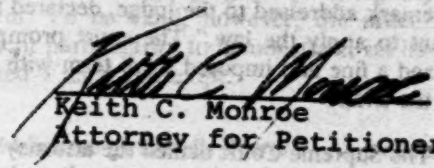
Counsel believes that this case is before this Court as the result of a hasty and ill-conceived but innocently intended remark which was followed by a tragic misunderstanding, a misunderstanding which could have been alleviated had there been time for further reflection.

For the foregoing reasons, it is respectfully suggested that the California civil contempt statutes are violative of the equal protection clause of the 14th Amendment and they are, in addition, by reason of that infirmity, productive of unnecessary and unfortunate appellate litigation. For those reasons, the Court is respectfully requested to grant a writ of certiorari and place the case on its calendar for argument.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully suggested that serious constitutional questions have been erroneously decided by the lower court and those questions are of fundamental importance to the administration of justice and the independence of the bar. The Court is therefore respectfully requested to grant certiorari and reverse the judgment of the California Supreme Court.

RESPECTFULLY SUBMITTED,



Keith C. Monroe
Attorney for Petitioner

[Crim. No. 16621. In Bank. Oct. 19, 1973.]

In re LAWRENCE BUCKLEY on Habeas Corpus.

SUMMARY

In a colloquy, in a criminal case, following the court's refusal to permit defendant's attorney to call the prosecutor as a witness, the attorney, in a remark addressed to the judge, declared that the "court obviously doesn't want to apply the law." The court promptly cited him for contempt, assessed a fine and imposed a jail term with sentence stayed until conclusion of the trial.

The Supreme Court denied the attorney's application for a writ of habeas corpus. The court explained that its sole function was to determine the question of the trial court's jurisdiction to render the judgment, and that the review of the evidence was limited to deciding whether there was any substantial evidence to sustain that jurisdiction. Observing that the attorney's remark was contemptuous on its face, had no basis in fact, was not made in furtherance of any legitimate motion for disqualification, and merely served to emphasize the attorney's displeasure, the Supreme Court held that it could not say that the attorney's conduct was, as a matter of law, not contemptuous. In rejecting the attorney's contention that the trial judge was required, as a matter of due process, to refer the matter of adjudication of the alleged contempt to another judge, the court took the view that due process requires a new and impartial judge only where it appears that object of the alleged contempt has become so personally embroiled as to make him unfit to sit in judgment on the contempt charge. The court found no such embroilment. And, in the light of the available remedies of certiorari and habeas corpus, the court found no merit in the attorney's contention of denial of equal protection of the laws, based on the fact that no appeal lies from an order made in contempt proceedings, although an appeal does lie from a conviction, under Pen. Code, § 166, of criminal contempt. (Opinion by Sullivan, J., with Wright, C. J., McComb, Burke and Clark, JJ., concurring. Separate dissenting opinion by Mosk, J., with Tobriner, J., concurring therein.)

HEADNOTES

Classified to McKinney's Digest

(1) **Contempt § 73—Extent of Review.**—In reviewing an adjudication of contempt of court, the sole question before the reviewing court is one of the trial court's jurisdiction to render the judgment. The review of the evidence is limited to determining whether there was any substantial evidence to sustain that jurisdiction.

[See **Cal.Jur.2d,** Contempt, § 78.]

(2) **Contempt § 2—Direct Contempt—Summary Treatment.**—Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily; all that is required is that an order be made reciting the facts, adjudging the person guilty and prescribing the punishment. To be valid, however, the order must recite the facts with sufficient particularity to demonstrate, on its face, that the conduct constituted a legal contempt.

(3) **Contempt § 3—Nature and Source of Court's Power.**—As a necessary incident to execution of a court's powers and maintenance of its dignity, if not its very existence, the court has inherent power to punish for contempt.

(4) **Contempt § 15—Acts Constituting Contempt—Misconduct of Attorneys—Direct Contempt.**—An attorney commits a direct contempt in impugning a court's integrity by statements made in open court either orally or in writing.

(5) **Contempt § 1—Summary Contempt Power—Restrictions on Use.**—A judge is well within his rights in protecting his own reputation from groundless attacks on his judicial integrity, and he has a duty to protect the integrity of his court. However, his ultimate weapon of the summary contempt power must be exercised with great caution, lest it stifle the freedom of thought and speech necessary to a fair trial.

(6) **Contempt § 15—Acts Constituting Contempt—Misconduct of Attorneys—Remark Contemptuous on Its Face.**—An attorney's remark, directed to the trial court, that "this court obviously doesn't want to

apply the law," was contemptuous on its face, where the record did not support such an accusation, and the remark was insolent, offensive, and insulting and impugned the court's dignity. Consequently, the court was not required to warn the attorney before citing him for contempt.

(7) **Contempt § 15—Acts Constituting Contempt—Misconduct of Attorneys—Respectful Advocacy.**—The rule that an attorney may not be summarily adjudged in contempt for aggressive but respectful advocacy will not protect insulting and disrespectful argument which serves no purpose other than to vent an attorney's anger.

(8) **Contempt § 73—Review—Evidence of Contemptuous Conduct.**—On a review of an order adjudicating an attorney in contempt, on the basis of his remark, addressed to the trial judge, that "this court obviously doesn't want to apply the law," the Supreme Court could not say that the attorney's conduct was, as a matter of law, not contemptuous, where the remark was contemptuous on its face, had no basis in fact, was not made in furtherance of any legitimate motion to disqualify the judge, and merely served to emphasize the attorney's displeasure with the trial court's refusal to rule in his favor.

(9a, 9b) **Contempt § 37—Propriety of Adjudication by Object of Alleged Contempt.**—The trial judge in a criminal case was not required, as a matter of due process, to refer the matter of adjudication of an alleged contempt by defendant's attorney to another judge, where the record failed to disclose that the judge to whom the allegedly contemptuous remark had been addressed had abrogated his duty to impose his moral authority on the proceedings, or had become so personally embroiled with the attorney as to be unfit to sit in judgment on the contempt charge.

(10) **Contempt § 63—Punishment—Direct Contempt—Effect of Apology.**—In instances of direct contempt of court, an apology to the judge should be given serious consideration. However, the effect to be given to such a mitigating factor lies exclusively in the trial judge's sound discretion.

(11a, 11b) **Contempt § 73—Review—Equal Protection of Law.**—The fact that no appeal lies from an adjudication, under Code Civ. Proc.,

§ 1211, of a direct contempt, whereas an appeal may be taken from a conviction, under Pen. Code, § 166, of criminal contempt, does not demonstrate a denial of equal protection of the laws, inasmuch as the procedures of certiorari and habeas corpus afford the alleged contemner the safeguards of a review equivalent to an appeal.

(12) **Contempt § 73—Certiorari—Habeas Corpus.**—Although an order made in a contempt proceeding is not appealable, it may be reviewed by certiorari or, in appropriate situations, by habeas corpus.

COUNSEL

Keith C. Monroe for Petitioner.

Adrian Kuyper, County Counsel, Charles B. Sevier, Deputy County Counsel, Cecil Hicks, District Attorney, Michael R. Capizzi, Assistant District Attorney, Oretta D. Sears and Alicemarie Stotler, Deputy District Attorneys, for Respondents.

OPINION

SULLIVAN, J.—In this proceeding in habeas corpus,[1] petitioner Lawrence Buckley, an attorney, seeks to annul an order of the Orange County Superior Court adjudging him in direct contempt of court, and sentencing him to jail for five days and imposing a fine of $500.[2]

The alleged contempt occurred in open court during the jury trial of a criminal case in which petitioner represented the defendant. In the course of the case in defense, petitioner unexpectedly called as a witness the prosecutor Mr. Brian, a deputy district attorney.[3] The judge thereupon admon-

[1]Petitioner sought a writ of habeas corpus or in the alternative a writ of certiorari. Either remedy is properly invoked. (*John Breuner Co.* v. *Bryant* (1951) 36 Cal.2d 877, 878 [229 P.2d 356]; *In re Circosta* (1963) 219 Cal.App.2d 777, 785 [33 Cal.Rptr. 514].) We chose to treat the petition as one praying for a writ of habeas corpus and issued an order to show cause. Respondents superior court and Sheriff of Orange County have filed separate returns.

[2]The order also provided that, in the event of failure to pay the fine, petitioner should serve, in addition to the five days, one day for each $25 of the fine remaining unpaid.

[3]"MR. BUCKLEY: Call Mr. Brian.
"MR. BRIAN: Who did he say?

ished and excused the jury and the following proceedings were had in open court, outside the presence of the jury.

We shall set forth in some detail the subsequent events so that the alleged contempt can be viewed in its proper setting.[4] After the jury was excused, an argument ensued in open court, at the start of which the prosecutor requested that the judge order petitioner to make an offer of what he expected to prove by calling the prosecutor as a witness. The pertinent portions of the record are set forth below.[5]

Asserting that he had the right to call the prosecutor or any other witness, petitioner continued as follows: "I don't believe the District Attorney stands in any stead or difference from any other witness, and if I want to call him as a witness I have a right to call him as a witness. Objections can be interposed question by question.

"THE COURT: Mr. Brian.

"MR. BUCKLEY: Mr. Patrick Brian.

"MR. BRIAN: Your Honor, before we get into any of Mr. Buckley's nonsense, may we have a hearing on that matter at the bench?

"THE COURT: Well, the jury goes back into that nice lovely room. . . ."

[4]The order adjudging petitioner in contempt attaches and incorporates as a part thereof a transcript of a portion of the oral proceedings described as the "colloquy" leading up to the alleged contempt.

[5]"MR. BRIAN: Your Honor, just for the record—

"THE COURT: Give him a chance. He hasn't explained why he wants to call you.

"MR. BRIAN: Before he does that, would the Court ask counsel to make an offer of proof regarding the evidence that he purports to elicit from me.

"THE COURT: I expect to get that.

"MR. BRIAN: And the relevancy of it, and any type of justification for that conduct.

"MR. BUCKLEY: I think the record should show that in the courtroom is Mr. Farnell, a Deputy District Attorney. The District Attorney is going to assert, in opposition to me calling him as a witness, that people would be without counsel.

"MR. BRIAN: I'm making no such argument.

"MR. BUCKLEY: Age-old argument that will resolve itself. Mr. Farnell could substitute in.

"THE COURT: I'm waiting to hear what you propose to prove by calling Mr. Pat Brian, Deputy District Attorney of the County of Orange.

"MR. BUCKLEY: Well, if the Court would give me a recess I'd have a personal conversation with Mr. Brian, an interview, and if he would answer my questions then I would be able to really know whether he can testify to material things. I think he can.

"THE COURT: Such as?

"MR. BUCKLEY: Well, the Court got involved in an order directing the defense to make available to the prosecution the names and addresses of alibi witnesses. The cases seem to indicate that's about as much from the defense, in terms of discovery, as the Court can order."

"THE COURT: I don't believe so, in view of his status in the case. You have an obligation—

"MR. BUCKLEY: The Court should let me finish my position so that the record is clear.

"THE COURT: I thought you had finished. I didn't know you went on forever.

"MR. BUCKLEY: The Court's persistent interruptions—

"THE COURT: Don't characterize my conduct as persistent interruptions or I'll cite you for contempt. Get on with your argument.

"MR. BUCKLEY: I lost my train of thought because of the Court's interruption."

Petitioner then reiterated his position that he was not required to make an offer of proof and the prosecutor renewed his objection. The following then occurred.

"MR. BRIAN: And I renew my objection. There's been no showing whatever that I have anything to offer in the case, and I've learned by sad experience not to talk to Mr. Buckley in person, and I refuse to do it unless there's a witness present. [¶] I have nothing to offer this case. I'm the prosecutor, and I refuse to take the stand. It's one of his cheap tricks.

"THE COURT: I'm not interested in your characterization.

"MR. BRIAN: I withdraw my characterization.

"MR. BUCKLEY: Would the Court ask the District Attorney to apologize.

"THE COURT: Did you apologize for calling him stupid?

"MR. BUCKLEY: Did I call him stupid?

"THE COURT: Yes, you did."

After a further exchange, the judge sustained the prosecutor's objection to being called as a defense witness. Petitioner continued to argue to the court. "MR. BUCKLEY: I don't call witnesses that won't offer relevant testimony, and this witness will offer relevant and material testimony.

"THE COURT: You'll have to first tell me what that is.

"MR. BUCKLEY: I think the Court and the prosecution bear a heavy burden.

"THE COURT: Stop telling me about my burden. Either comply with the order or sit down.

"MR. BUCKLEY: What is the order?

"THE COURT: The order is unless you tell me the relevant information I'm not going to permit you to call him.

"MR. BUCKLEY: Is that going to be so with every witness?

"THE COURT: No, that only applies to the District Attorney."

A lengthy exchange between petitioner and the court then ensued, during which petitioner argued that he was entitled to interrogate the prosecutor about oral statements made to him by defendants, since such statements would have been discoverable anyhow had they been reduced to writing. When asked by the court for authority supporting such a position, petitioner continued: "MR. BUCKLEY: I call upon the Court's experience as a judge that everything isn't written down in law books, that new questions arise every day that aren't in the cases.

"THE COURT: You don't have authority for it, is that it? It's denied.

"MR. BUCKLEY: The District Attorney—

"THE COURT: I don't want to hear the argument. It's denied.

"MR. BUCKLEY: The District Attorney has none to the contrary. It's consistent with all other—

"THE COURT: I've heard enough argument on it.

"MR. BUCKLEY: I'll cite to the Court *In Re Ferguson*, 5 Cal.3d 525, which talks about the obligation of the District Attorney to turn over to the defense, even without request, all information of a substantial and material nature; says nothing about whether it is written or not. In fact, the Court says there is no need for the defense to make a written notice that will just clog the Court's file with unnecessary paperwork. [¶] That's my case. I rely on that. [¶] I'll move the Court for a mistrial.

"THE COURT: Denied.

"MR. BUCKLEY: *This Court obviously doesn't want to apply the law.*

"THE COURT: Stop insulting me and sit down. [¶] Don't tell me I don't want to apply the law. It's grossly insulting and this time I'm going to cite you for contempt. For grossly contemptuous behavior in impugning to this Court a willful desire not to apply the law. It is highly insulting, high in-

true, and you're punished with five days in the Orange County jail and a fine of five hundred dollars, the sentence to take effect upon the conclusion of this trial. It will be stayed until the verdict is rendered in this case."[6] (Italics added.)

At the start of the proceedings on the following morning, petitioner in open court and outside the presence of the jury apologized to the court for being late. In the ensuing colloquy between petitioner and the court, during which petitioner remarked that "this Court has questions about my credibility," petitioner apologized to the court for "the comment I made yesterday."[7] The record discloses, however, that the judge upon further reflection chose to regard the proffered apology as having "poured salt on the wound."[8]

During the afternoon session that day, petitioner in open court and out of the presence of the jury addressed the judge on the subject of his prior apology and the court's subsequent observation that the apology "only magnified the nature of the contempt." His inquiry as to why the judge had rejected the apology was met by the judge's response that he "never accepted it or rejected it" but had considered that the apology "only magnified the insult, because the accusation was a charge on the integrity of this court. The accusation was, I knew the law, and didn't obey it. So merely stating I knew the law, merely emphasized the fact that I had no integrity."[9]

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[6] The judge then ordered a 10 minute recess. There is no indication in the record nor in the contempt order that the recess was necessary to maintain order or was in any way a result of petitioner's remark.

[7] "MR. BUCKLEY: Well, with respect to the comment I made yesterday, I apologize to the Court. That was a comment made perhaps in the heat of anger or combat, and I do apologize, because I do respect this Court and the Court's legal knowledge, and I disagree with the Court, but I don't disrespect it.

"THE COURT: I'll see whether that's made in good faith by the manner in which you conduct yourself the remainder of this trial.

"MR. BUCKLEY: I'll do my best to support it."

[8] "Of course, the record will also show that I cited Mr. Buckley for contempt yesterday and his purported apology this morning. He accused me of willfully disobeying the law in order to help the prosecution to conduct an unfair trial in behalf of his client. I'd much rather be accused of stupidity than of malice.

"Today Mr. Buckley was kind enough to say he respected my knowledge of the law, which only made the charge of willfully disobeying it all the more serious. Rather than expunging the contempt, it poured salt on the wound, because with all my purported knowledge of the law, there would be even less excuse in Mr. Buckley's eyes for my disobedience of it."

[9] It is interesting to note that at that point petitioner appears to have pursued a course of interrogating the court in respect to his above position. "MR. BUCKLEY: That was the Court's position . . . ?

"THE COURT: That's as I understand it.

Declining to exonerate petitioner for his allegedly contemptuous remark, the judge made and filed a written order adjudicating petitioner in contempt, which we set forth in relevant part in the margin.[10] Petitioner was taken into custody but was later released. This proceeding in habeas corpus followed.[11]

"MR. BUCKLEY: All right. In any event, did anything transpire this morning between the time I made the apology and when the Court interpreted the apology?

"THE COURT: Well, I had a chance to think about the language.

"MR. BUCKLEY: Nothing occurred on the record that indicated the apology was not made in good faith?

"THE COURT: I'm not sure, but I don't think so at the moment. Are you testing me subjectively? I can't think of anything at the moment.

"MR. BUCKLEY: I was trying to—see, today I was quite startled with the statement the Court made, because I had made the apology in good faith and I thought the Court was at least considering—

"THE COURT: In my opinion, the so-called apology does not exonerate a lawyer who behaves contemptuously in the presence of the Court. I don't think it's an excuse for contemptuous conduct. . . ."

[10]"It is hereby found, ordered and adjudged that:

"(1) On September 19, 1972, in the immediate presence and view of the Court, during proceedings in the above-entitled action, Lawrence Buckley, counsel for defendant, stated in open court that the Trial Judge 'obviously does not want to apply the law,' in a colloquy the full portion of which is attached hereto and made a part hereof.

"(2) Such statement in effect accused the Trial Judge of lack of integrity, tended to interrupt the due course of the trial then in progress, and constituted contemptuous behavior.

"(3) For said contempt, said Lawrence Buckley is hereby committed to the custody of the Sheriff of Orange County for Five Days and is hereby fined the Sum of Five Hundred Dollars ($500.00), plus penalty assessment.

". . . . . .

"(4) After said contempt, said Lawrence Buckley said he 'apologized' and respected the Court's knowledge of the law. Such purported 'apology' served only to emphasize the previous attack on the integrity of the Court, which in effect, charged the Court with knowing the law and deliberately refusing to obey it. *The transcript regarding said apology are also attached hereto and made a part hereof. HSH*

"(5) A stay of only those provisions of this order committing the said Lawrence Buckley to the custody of the Sheriff of Orange County is granted until verdict is rendered or the jury discharged in the above-entitled proceeding.

"(6) A further stay of only those provisions committing said Lawrence Buckley to the custody of the Sheriff of Orange County shall be granted upon the institution by said Lawrence Buckley of appropriate proceedings to review the within adjudication of contempt in a higher court and upon posting of bail in the sum of One Thousand ($1,000.00) Dollars." (Italicized portion handwritten and initialed by judge.)

[11]Although the order to show cause named only the Sheriff of Orange County, both the superior court (represented by the county counsel) and the sheriff (represented by the district attorney) have filed "answers" and written returns. Both parties will be referred to herein as respondent.

Petitioner directs a three-pronged attack on the order adjudicating him in contempt. His contentions may be summarized as follows: (1) That the order is insufficient on its face to support the jurisdiction of the trial court and is not supported by the record; (2) that under the circumstances of the case, the trial judge was required, as a matter of due process, to refer the charge of the alleged contempt to another judge for adjudication; and (3) that California procedure in contempt matters, insofar as it fails to provide for a stay or an appeal as a matter of right, denies a contemner the equal protection of the laws.

I

Preliminarily we make some observations as to the order under review. Fairly read, it indicates that petitioner was found to be in contempt only for a single act of misconduct—his statement in open court that "This Court obviously doesn't want to apply the law." (See fn. 10, *ante*, and text accompanying fn. 6.)[12] Nowhere does the order state that petitioner made this statement in a loud, boisterous, insolent or rude manner. It does recite, however, that the statement "tended to interrupt the due course of the trial then in progress," language almost identical with that found in subdivision 1 of section 1209 of the Code of Civil Procedure.[13] We additionally observe that there are attached to, and made a part of the order, transcripts of the full portion of the colloquy between petitioner and the court (see fn. 10, *ante*, 1st par.) as well as of petitioner's apology (*id.*, 4th par.)

These preliminary matters out of the way, we turn to petitioner's first contention. Essentially his point is this: That the order of contempt rests

[12]The order is sufficiently specific to preclude any conjecture that it might be based on other acts of petitioner. The first sentence of the order quotes the remark and attaches a copy of the transcript to show the context in which it was made. The next sentence charges that "*Such statement* in effect accused the Trial Judge of lack of integrity, tended to interrupt the due course of the trial then in progress, and constituted contemptuous behavior." (Italics added.)

For this reason, facts concerning other behavior by petitioner are relevant only to the extent that they shed light on the intent with which the remark was made or the effect which the remark had on the proceedings. Other conduct may not serve as independent grounds for contempt, since to do so would violate the requirement that the facts show, without the aid of speculation, that a contempt occurred. (*Chula v. Superior Court* (1962) 57 Cal.2d 199, 203 [18 Cal.Rptr. 507, 368 P.2d 107, 97 A.L.R.2d 421].)

[13]Section 1209 provides in pertinent part: "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: [¶] 1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding."

Hereafter, unless otherwise indicated, all section references are to the Code of Civil Procedure.

on a single remark of nine words alleged to be contemptuous; that such statement was not found to have been made in a loud, boisterous or offensive manner; that although found to have tended to interrupt the due course of the trial, such finding is totally unsupported by the record; and that, as a result, petitioner's statement did not constitute contempt.

(1) In reviewing an adjudication of contempt, "the sole question before us is one of jurisdiction of the trial court to render the judgment under review, and in such a case the review of the evidence is limited to determining whether there was any substantial evidence to sustain the jurisdiction of the trial court." (*The Times-Mirror Co.* v. *Superior Court* (1940) 15 Cal.2d 99, 115 [98 P.2d 1029], revd. other grounds (1941) 314 U.S. 252 [86 L.Ed. 192, 62 S.Ct. 190, 159 A.L.R. 1346]; *Bridges* v. *Superior Court* (1939) 14 Cal.2d 464, 484 [94 P.2d 983], revd. other grounds (1941) 314 U.S. 252 [86 L.Ed. 192, 62 S.Ct. 190, 159 A.L.R. 1346].) More recently we said that "the responsibility of the reviewing court is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court." (*In re Ciraolo* (1969) 70 Cal.2d 389, 394 [74 Cal.Rptr. 865, 450 P.2d 241], citing *Arthur* v. *Superior Court* (1965) 62 Cal.2d 404, 409-410 [42 Cal.Rptr. 441, 398 P.2d 777], and *Bridges* v. *Superior Court*, *supra*, 14 Cal.2d at p. 485.)

(2) The requirements of the order adjudicating contempt have been given expression in numerous opinions. In *Arthur* v. *Superior Court*, *supra*, 62 Cal.2d at page 407, we observed: "Section 1211 of the Code of Civil Procedure establishes the procedure that is to be followed in adjudging persons in contempt of court. Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be made reciting the facts, adjudging the person guilty and prescribing the punishment." We have emphasized, however, that such an order is valid only if it recites facts with sufficient particularity to demonstrate on its face that petitioner's conduct constituted a legal contempt. (*Chula* v. *Superior Court*, *supra*, 57 Cal.2d at p. 203; *Raiden* v. *Superior Court* (1949) 34 Cal.2d 83, 86 [206 P.2d 1081]; *Gallagher* v. *Municipal Court* (1948) 31 Cal.2d 784, 795 [192 P.2d 905].)

(3) It is well established that a court has inherent power to punish for contempt of court (*In re McKinney* (1968) 70 Cal.2d 8, 10-11 [73 Cal. Rptr. 580, 447 P.2d 972] and cases there cited). As this court declared many years ago in a case repeatedly cited with approval, this inherent power "is a necessary incident to the execution of the powers conferred

...on the court, and is necessary to maintain its dignity, if not its very ex-...ence." (*In re Shortridge* (1893) 99 Cal. 526, 532 [34 P. 227].)

(4) Thus it is the settled law of this state that an attorney commits a ...rect contempt when he impugns the integrity of the court by statements ...de in open court either orally or in writing. (*In re Ciraolo, supra*, 70 ...l.2d 389, 394-395 (false accusation in affidavit); *Hume* v. *Superior Court* ...941) 17 Cal.2d 506, 513-514 [110 P.2d 669] (false charge of collusion ...judge with Attorney General); *Blodgett* v. *Superior Court* (1930) 210 ...l. 1, 16 [290 P. 293, 72 A.L.R. 482] (false charge of corruption in legal ...morandum); *Matter of Shay* (1911) 160 Cal. 399, 407-408 [117 P. 442] ...ter imputing improper conduct to Supreme Court justices); *Lamberson* ...*Superior Court* (1907) 151 Cal. 458, 462-464 [91 P. 100] (affidavit to ...qualify judge charging corrupt and improper motives); *In re Grossman* ...972) 24 Cal.App.3d 624, 634-640 [101 Cal.Rptr. 176] (false accusations ...gainst judge); *Gillen* v. *Municipal Court* (1940) 37 Cal.App.2d 428, 429, ...31 [99 P.2d 555] (oral statement that opposing counsel won before he ...arted); *Hallinan* v. *Superior Court* (1938) 27 Cal.App.2d 433, 438-439 ...1 P.2d 254] (affidavit charging dishonesty of presiding judge); *In re Friday* ...934) 138 Cal.App. 660, 663 [32 P.2d 1117] (objections to court's rulings ...ely charging trial judge with improper conduct); *Ex parte Ewell* (1925) ...1 Cal.App. 744, 747-748 [236 P. 205] (letter attacking judge); *Matter of ...Application of Lapique* (1915) 26 Cal.App. 258 [146 P. 690] (affidavit in ...port of motion for change of venue imputing lack of integrity in judge). ...e 4 Witkin Cal. Procedure (2d ed. 1971), pp. 2973-2974.)[14] Insolence to ...e judge in the form of insulting words or conduct in court has traditionally ...en recognized in the common law as constituting grounds for contempt. ...Oswald on Contempt (1911) pp. 51-54.) (5) As we recently said in

[14]Section 1209 establishes a list of acts or omissions which may constitute con-...mpt of court, including "1. Disorderly, contemptuous or insolent behavior toward ...e judge while holding the court, *tending to interrupt the due course of a trial* or ...ther judicial proceeding." (Italics added.) The list is not exclusive, however, for the ...wer of a court to punish by contempt an act which impugns its integrity exists ...dependent of statute. (Cf. *In re Shortridge, supra*, 99 Cal. at p. 532.) "The ...egislative department may regulate the procedure and enlarge the power, but it ...annot without trenching upon the constitutional powers of the court and destroying ...e autonomy of that system of checks and balances, which is one of the chief ...atures of our triple-department form of government, fetter the power itself." (*Id.*) ...See also *In re San Francisco Chronicle* (1934) 1 Cal.2d 630, 634-635 [36 P.2d ...95].)

We note that the contempt order here states that petitioner's remark "accused the ...trial Judge of lack of integrity." Such conduct, if supported by the record, may be ...punished by contempt under the general rule set forth in the text, *supra*. We need ...not consider whether the remark also tended to interrupt the due course of the trial, ...as the order alleges, so as to justify independent grounds for contempt under section ...1209, subdivision 1.

Ciraolo, supra, quoting from *Friday, supra,* and *Lamberson, supra,* " 'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' (*In re Friday, supra,* 138 Cal.App. 660, 663; see also *Daily* v. *Superior Court, supra,* 4 Cal.App.2d 127, 133 [40 P.2d 936].) 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.' " (*In re Ciraolo, supra,* at pp. 394-395.)[18]

Nevertheless we have warned that the judge's ultimate weapon of the summary contempt power "must be exercised with great caution, lest it stifle the freedom of thought and speech so necessary to a fair trial under our adversary system. That system is built upon the belief that truth will best be served if defense counsel is given the maximum possible leeway to urge in a respectful but nonetheless determined manner, the questions, objections, or argument he deems necessary to the defendant's case: 'He has a right to press a legitimate argument and to protest an erroneous ruling.' [Citation.] Indeed, so essential is this 'fundamental interest of the public in maintaining an independent bar' . . . that 'a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly processes.' " (*Smith* v. *Superior Court* (1968) 68 Cal.2d 547, 560 [68 Cal.Rptr. 1, 440 P.2d 65], quoting *Gallagher* v. *Municipal Court, supra,* 31 Cal.2d 784, 788, 795, 796.) When, however, aggressive advocacy gives way to insolence and disrespect towards the court and particularly when it degenerates into "impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court" (*Hume* v. *Superior Court, supra,* 17 Cal.2d at p. 513) it is the trial judge's "bounden duty to protect the integrity of his

[18]Distinguishable from these cases are decisions holding that an attorney is not guilty of contempt of court when in good faith he states facts which he believes to be true and which support allegations of bias made in connection with a motion to disqualify a judge. (*Woolley* v. *Superior Court* (1937) 19 Cal.App.2d 611, 627-628 [66 P.2d 680]; *In re Cunha* (1932) 123 Cal.App. 625, 635 [11 P.2d 902, 18 P.2d 979].) Also distinguishable from the cases cited above are those instances of contemptuous behavior where the judge may be subject "to ridicule and insult by intonations and gestures accompanying words wholly innocuous. . . ." (*Gallagher* v. *Municipal Court, supra,* 31 Cal.2d at p. 796.) We have held that in such cases "something more is required to support the order than the mere recital therein that the tone of voice used was contemptuous." (*In re Hallinan* (1969) 71 Cal.2d 1179, 1181-1182 [81 Cal.Rptr. 1, 459 P.2d 255].) The record must show that the judge first warned the attorney that his tone of voice and facial expression are offensive. (*Id.* at p. 1185; *Gallagher* v. *Municipal Court, supra,* at p. 797.)

court." (*In re Friday, supra,* 138 Cal.App. at p. 663; see *Lamberson* v. *Superior Court, supra,* 151 Cal. at pp. 461-462.)

Applying the foregoing authorities to the matter before us, we think it is manifest that petitioner's statement constituted an attack on the integrity of the court. The offending language—"[t]his Court obviously doesn't want to apply the law"—fairly read, means, as indeed the trial judge took it to mean, that the judge knew the law but deliberately chose to ignore it. In essence the statement does not constitute a mere accusation of bias, that is, a mere "condition of mind" (*Estate of Friedman* (1918) 178 Cal. 27, 39 [172 P. 140]) or merely a " 'leaning of the mind; propensity or prepossession toward an object or view, not leaving the mind indifferent' " (*Evans* v. *Superior Court* (1930) 107 Cal.App. 372, 380 [290 P. 662] quoting from Webster's New Internat. Dict.)

In our view the statement goes beyond one reflecting a mere mental outlook or predilection and makes a charge of deliberate judicial dishonesty. (6) We are of the opinion that the record does not support such an accusation against the judge and that the statement was insolent, offensive, insulting, and impunged the integrity of the court. We conclude that the statement was contemptuous on its face.[16] Since the contempt order is not based on "words wholly innocuous" (*Gallagher* v. *Municipal Court, supra,* 31 Cal.2d at p. 796) or on "language of which is in itself not insolent, contemptuous or disorderly" (*In re Hallinan, supra,* 71 Cal.2d at p. 1181) the judge was not required first to warn petitioner before taking disciplinary action against him. (*Gallagher, supra,* at p. 797; *In re Hallinan, supra,* at p. 1183.)

Petitioner contends, however, that reversal of the order before us is compelled by the recent decision of the United States Supreme Court in *In re Little* (1972) 404 U.S. 553 [30 L.Ed.2d 708, 92 S.Ct. 659]. There the contemner-petitioner, a layman, attempted to act as his own attorney in a

[16]The remark for which petitioner was cited appears to have been the climax to several prior impertinent remarks directed at the judge by petitioner. (See text between fns. 5 and 6, *ante.*) Thus, both on its face and within the context in which it was uttered, it appears to be contemptuous.

Pertinent here is the following from *Gillen* v. *Municipal Court, supra,* 37 Cal.App.2d 428, 431: "However, it is clear said municipal court had jurisdiction of the proceedings pending before it. It also had jurisdiction to determine what was or was not contemptuous language. Unless we can say, as a matter of law, that said language was susceptible of that construction only, for which the petitioner now contends, we may not say the trial court exceeded its jurisdiction. The language used by the petitioner is to be considered in connection with all of the surrounding circumstances. Having read the record with due care we are unable to say, as a matter of law, that the trial court did not properly construe the language used by petitioner."

state criminal trial, when his retained counsel was unable to appear and the petitioner was unable to obtain a continuance. In his summation (the opinion not indicating whether trial was to the court or to a jury) the petitioner made statements that the court was biased and had prejudged the case, and that the petitioner was a political prisoner. The court adjudged him in contempt after concluding that his conduct and words were contemptuous and " 'reflected on the integrity of the Court and tended to subvert and prevent justice.' " (*Id.* at p. 554 [30 L.Ed.2d at p. 710].) Habeas corpus relief was denied by an intermediate appellate state court which upheld the adjudication in a judgment that tracked "the statutory language in reciting that petitioner's statements 'directly tended to interrupt its proceedings and to impair the respect due the [trial court's] authority.' " (*Id.* at p. 554 [30 L.Ed.2d at p. 710].)[17]

In what appears to be a narrow holding, the United States Supreme Court in a per curiam opinion reversed the judgment. "We hold that *in the context of this case* petitioner's statements in summation did not constitute criminal contempt. The court's denial of the continuance forced petitioner to argue his own cause. He was therefore clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause. *In re McConnell* (1962) 370 U.S. 230. There is no indication, and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding. Therefore, 'The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.' *Craig* v. *Harney*, 331 U.S. 367, 376 (1947). 'Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.' (*Brown* v. *United States*, 356 U.S. 148, 153 (1958)." (*Id.* at p. 555 [30 L.Ed.2d at pp. 710-711]; italics added.)

[17]The appellate court also held that the trial court's conclusion amounted to a finding that the words tended to interrupt the court's proceedings and to impair respect due its authority.

As noted in *Little* (*id.* at p. 555, fn. [30 L.Ed.2d at p. 710]), a North Carolina statute made punishable for contempt " '[d]isorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.' "

We have some difficulty in attempting to determine whether the United States Supreme Court's decision in *Little* compels, as petitioner contends, a reversal of the contempt order here. Initially, it may be noted, the court chose to limit its holding to "the context of this case," emphasizing the special circumstances with which it was faced: the contemner was a layman, inexperienced in the rules of courtroom decorum, who was attempting to defend himself in a criminal trial after his counsel had failed to appear. It is not surprising that such a person would make improper remarks in his final argument without realizing that he was subjecting himself to the extraordinary power of summary contempt. Secondly, although the high court's opinion gives the gist of the petitioner's remarks, it does not quote the words actually used, so that we cannot discern their offensive or innocuous character on their face.

Our reading of *Little* is further complicated by our inability to detect the specific constitutional infirmity dictating the high court's result. The court merely concluded that reversal of the conviction was required by its earlier holding in *Holt* v. *Virginia* (1965) 381 U.S. 131 [14 L.Ed.2d 290, 85 S.Ct. 1375].[18] In *Holt*, the defendant attorneys had charged that their summary adjudication of contempt violated the due process clause of the Fourteenth Amendment. The United States Supreme Court agreed, holding that due process requires the states to allow attorneys to file proper motions that are necessary to ensure a fair trial, an essential element of due process.[19] It is important to note, however, that in *Holt* "the words used in

[18]"The reversal of this conviction is necessarily required under our holding in *Holt* v. *Virginia*, 381 U.S. 131 (1965). There attorneys filed motions that the trial judge recuse himself and for a change of venue, alleging that the judge was biased. The motion for change of venue alleged that the judge intimidated and harassed the attorney's client. The court adjudged the attorneys in contempt for filing these motions. We reversed for reasons also applicable here: [¶] 'It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part.' *Id.*, at 136." (*In re Little*, *supra*, 404 U.S. at p. 556 [30 L.Ed.2d at p. 711].)

[19]"And it is settled that due process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense—a right to his day in court— . . . and to be represented by counsel.' [Citations.] The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. [Citation.] And since 'A fair trial in a fair tribunal is a basic requirement of due process,' [citation], it necessarily follows that motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential. [Citations.] Consequently, neither Dawley nor his counsel could consistently with due process be convicted for

the motions were *plain English, in no way offensive in themselves, and wholly appropriate to charge bias* in the community and bias of the presiding judge." (*Holt* v. *Virginia, supra,* 381 U.S. at p. 137 [14 L.Ed.2d at p. 294]; italics added.)[20]

(7) We read *Holt* as merely affirming, upon constitutional grounds of due process, the settled rule that an attorney may not be summarily adjudged in contempt for aggressive but respectful advocacy. This rule and its limitations are eloquently set forth in *Sacher* v. *United States* (1952) 343 U.S. 1 [96 L.Ed. 717, 72 S.Ct. 451], in upholding the summary conviction of an attorney for direct contempt committed while representing the defendant in a criminal case.[21] (See also *Fisher* v. *Pace* (1949) 336 U.S. 155,

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contempt for filing these motions *unless it might be thought that there is something about the language used which would justify the conviction.*" (*Holt* v. *Virginia, supra,* 381 U.S. at pp. 136-137 [14 L.Ed.2d at pp. 293-294]; italics added.)

[20]The court expressly declined to pass on the question whether summary convictions of the attorneys were invalid because the alleged misconduct did not disturb the court's business or threaten demoralization of its authority. (*Holt* v. *Virginia, supra,* 381 U.S. at pp. 135-136, fn. 2 [14 L.Ed.2d at p. 293].)

[21]"Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.

"Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. *But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.* During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation." (*Sacher* v. *United States, supra,* 343 U.S. at pp. 8-9 [96 L.Ed. at p. 725], italics added.)

See also *Illinois* v. *Allen* (1970) 397 U.S. 337, 343 [25 L.Ed.2d 353, 358-359, 90 S.Ct. 1057], in which the Supreme Court set the constitutional guidelines by which a criminal defendant may be silenced for disruptive conduct: "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard of the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stub-

163 [93 L.Ed. 569, 574, 69 S.Ct. 425]; *United States* v. *Schiffer* (6th Cir. 1965) 351 F.2d 91, 94; *Raiden* v. *Superior Court, supra,* 34 Cal.2d at p. 86; *Gallagher* v. *Municipal Court, supra,* 31 Cal.2d at pp. 796-797; 4 Witkin Cal. Procedure (2d ed. 1971), pp. 2970-2973.) We do not think that *Little*, the holding of which was carefully limited to the particular facts of that case, was intended to broaden this time-honored rule in order to protect insulting and disrespectful argument that serves no purpose other than to vent an attorney's anger.[22]

(f) Unlike the attorneys' affidavit in *Holt*, petitioner Buckley's remark was not "plain English, in no way offensive in [itself], and wholly appropriate to charge bias . . . ." (*Holt* v. *Virginia, supra,* 381 U.S. at p. 137 [14 L.Ed.2d at p. 294].) Rather, the remark "This court obviously doesn't

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boldly defiant defendants must be given sufficient discretion to meet the circumstances of each case." These words apply a fortiori to conduct by attorneys, who, by their position and training, have the duty to insure order in our judicial system.

[22]Further cause for confusion arises from references in *Little* which might be read as implying that, to be punishable for direct contempt, conduct must result in " 'an imminent, not merely a likely, threat to the administration of justice.' " (*In re Little*, supra, 404 U.S. at p. 555 [30 L.Ed.2d at p. 711], quoting *Craig* v. *Harney* (1947) 331 U.S. 367, 376 [91 L.Ed. 1546, 1552, 67 S.Ct. 1249]) or an "obstruction to the administration of justice." (*Id.*, quoting *Brown* v. *United States* (1958) 356 U.S. 148, 153 [2 L.Ed.2d 589, 595, 78 S.Ct. 622, 72 A.L.R.2d 818].) Petitioner seizes upon this language in arguing that, to be punishable for contempt, conduct must somehow physically disrupt the proceedings.

We are unconvinced that the United States Supreme Court, in stating the above-quoted dicta, intended to limit the contempt power of state courts to apply only to those cases in which there has been a physical obstruction to the administration of justice. An examination of *Craig* and *Brown* supports this conclusion. In *Craig*, the Supreme Court reversed an adjudication of constructive contempt against several newspapermen for articles attacking a judicial ruling. The decision is based upon the traditionally zealous protection of freedom of the press under the First Amendment. Unlike a newspaper, a courtroom is not a proper forum for free-wheeling exchange of ideas. An attorney's freedom of speech in this setting must be tempered to insure that courts of law accomplish that for which they were created—dispensing justice in a reasonable, efficient and fair manner. In short, we fail to see how the rule of *Craig* applies to a case involving direct contempt by an attorney.

Nor does the test employed in *Brown* apply to this case. *Brown* dealt with the power of a *federal* court to punish for direct contempt. The federal contempt power is defined by a federal statute passed in 1831 which has long been held to limit the power of federal courts to summarily punish for contemptuous conduct. This statute, 18 United States Code, section 401, states in relevant part: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—[¶] (1) Misbehavior of any person in its presence or so near thereto as to *obstruct the administration of justice*." (Italics added.)

Brown merely restates the federal statutory rule, which "does not, however, reflect the constitutional limits of the states' contempt powers." (*Weiss* v. *Burr* (9th Cir. 1973) —— F.2d ——, ——, fn. 13.)

want to apply the law" was contemptuous on its face, had no basis in fact, and was not made in furtherance of any legitimate motion to disqualify the judge. It merely served to emphasize petitioner's displeasure with the court's refusal to rule in his favor. "But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal." (*Sacher* v. *United States, supra,* 343 U.S. at p. 9 [96 L.Ed. at p. 723].)

We hold here that when petitioner's argument turned from advocacy to insult, the trial court was acting properly in holding him in contempt. We are of the opinion that *Little* does not derogate from the settled California rule set forth by us, *supra* (see text accompanying fn. 14, *ante*) that an attorney commits a direct contempt when he impugns the integrity of the court by statements in open court. Indeed, in our view, *Little* not only rests on a different principle but is also distinguishable on its facts. We have endeavored to evaluate petitioner's language in the perspective of the trial, mindful of the fact that he is an advocate pressing his claim, according him "[f]ull enjoyment of that right, with due allowance for the heat of controversy" (*Sacher* v. *United States, supra,* 343 U.S. at p. 9 [96 L.Ed. at p. 723]), and sensitive to the hazard that in vindicating the dignity and authority of the court, the judge's contempt power must have become "an instrument of tyranny." (*Fisher* v. *Pace, supra,* 336 U.S. at p. 163 [93 L.Ed. at p. 574]; Douglas, dissenting.) In the light of all these circumstances, we cannot say that petitioner's conduct was as a matter of law not contemptuous.

II

We now turn to petitioner's argument that the trial judge was required, as a matter of due process, to refer the matter of adjudication of the alleged contempt to another judge. Petitioner relies upon *Mayberry* v. *Pennsylvania* (1971) 400 U.S. 455 [27 L.Ed.2d 532, 91 S.Ct. 499], for the proposition that a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemner.

In *Mayberry*, the Supreme Court overturned adjudications of contempt made in a state proceeding. Three defendants, none of them a lawyer, represented themselves in a criminal trial before a jury. At the end of the trial, the judge held them in contempt for numerous remarks made in court and directed at the judge. The Supreme Court vacated the judgment, and remanded the case to be considered by a judge other than the one at whom the remarks were directed.

The court in *Mayberry* focused on two factors that compelled reversal. First, it pointed out that the judge had waited until the end of trial to adjudge the defendants in contempt.[23] Second, and most important, the court did not prohibit judges from sitting in judgment on contemptuous behavior that occurs before them; rather, it held that due process requires a new and impartial judge only where there is evidence that the trial judge "has become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge." (*Id.* at p. 465 [27 L.Ed.2d at p. 540].)[24]

In the case at bench, unlike *Mayberry*, the trial court did not wait to adjudge petitioner in contempt, but immediately cited him and soon thereafter signed the order of commitment. (9a) More importantly, from our review of the instant record, we cannot say that the judge was so personally embroiled with petitioner that he was unfit to sit in judgment on the contempt charge. The attack here did not consist of "fighting words" which the court found in *Mayberry* carried such a potential for bias as to require disqualification. Petitioner's conduct, even though disrespectful, did not rise to the level of personal vilification which by itself would give evidence of the trial court's probable personal embroilment.[25]

Nor do statements made by the judge indicate that he was unfit to sit in judgment. (Contrast *Offutt* v. *United States* (1954) 348 U.S. 11, 16-17 [99 L.Ed. 11, 17-18, 75 S.Ct. 11].) For example, the judge's remark, cited by petitioner, that "I didn't know you went on forever," made after an inter-

[23]"Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." (*Mayberry* v. *Pennsylvania, supra,* 400 U.S. at pp. 463-464 [27 L.Ed.2d at p. 539].)

[24]"It is, of course, not every attack on a judge that disqualifies him from sitting. In *Ungar* v. *Sarafite,* 376 U.S. 575, we ruled that a lawyer's challenge, though 'disruptive, recalcitrant and disagreeable commentary,' was still not 'an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.' *Id.,* at 584. Many of the words leveled at the judge in the instant case were highly personal aspersions, even 'fighting words'—'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool.' He was charged with running a Spanish Inquisition and told to 'Go to hell' and 'Keep your mouth shut.' Insults of that kind are apt to strike 'at the most vulnerable and human qualities of a judge's temperament.' *Bloom* v. *Illinois,* 391 U.S. 194, 202." (*Id.* at pp. 465-466 [27 L.Ed.2d at p. 540].)

[25]See *Weiss* v. *Burr, supra,* —— F.2d at pages —— (insulting remarks concerning the court's ruling; judge held not personally embroiled); *In re Grossman, supra,* 24 Cal.App.3d at pp. 632-633 (insulting remarks; judge held not personally embroiled). But see *United States* v. *Meyer* (1972) 462 F.2d 827 [149 App.D.C. 212] (accusation by attorney that the judge had made up his mind on the case before entering the courtroom held "sufficiently personal to invoke the *Mayberry* doctrine." (*Id.* at p. 844.)).

ruption of petitioner's argument, may demonstrate impatience but certainly not personal embroilment. Similarly, the judge's remarks that "I cannot attribute [the delay on petitioner's part] to anything except the cunning, shrewd and deliberate attempt to thwart me," appear to represent an accurate picture of petitioner's conduct, rather than an example of bias.

More difficult, however, is the disposition of petitioner's assertion that the judge demonstrated his personal involvement by totally misconstruing petitioner's attempt to apologize. As previously noted, the day after petitioner was cited for contempt, he apologized to the judge for the remarks in question. (See fn. 7, *ante*.) The judge, upon reflection, construed this apology as a further affront to his integrity, since it implied that he knew the law and wilfully disobeyed it. (See fn. 8, *ante*.)

(10) We have held that in instances of direct contempt an apology to the judge should be given serious consideration. (*People* v. *Turner* (1850) 1 Cal. 152, 153.)[26] The effect to be given to such a mitigating factor lies exclusively in the sound discretion of the trial judge. (*Lyons* v. *Superior Court*, *supra*, 43 Cal.2d at p. 763; *City of Vernon* v. *Superior Court* (1952) 38 Cal.2d 509, 520 [241 P.2d 243]; *In re Friday*, *supra*, 138 Cal.App. at p. 664.)

While the trial judge appears to have seriously considered petitioner's apology, it is arguable that he misinterpreted it.[27] Even if he did, we think that this is insufficient to establish that the judge was personally embroiled with petitioner. A useful comparison may be made with *Offutt* v. *United States*, *supra*, 348 U.S. 11, in which the Supreme Court reversed a contempt adjudication made by a federal judge. Among other things, the judge made the following statements in discharging the jury at the end of the case: "'I also realize that you had a difficult and a disagreeable task

[26]"A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the law; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct." See also *Lyons* v. *Superior Court* (1955) 43 Cal.2d 755, 763 [278 P.2d 681]: "Likewise, even where the finding of contempt appears essential to the proper conduct of the court's business no class of offense occurs to us in which the court should more readily search out and give effect to mitigating circumstances than in cases of direct contempts."

[27]Our intuition must be tempered by the realization that we are forced to depend upon a record which fails to convey the full circumstances surrounding the apology. "A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemner; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record." (*In re Little*, *supra*, 404 U.S. at p. 556 [30 L.Ed.2d at p. 711]; Burger, C. J., concurring.)

in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst.' " (*Id.* at p. 17, fn. 3 [99 L.Ed. at p. 17].) The Supreme Court concluded: "The record discloses not a rare flare-up, not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." (*Id.*)

The record in this case fails to disclose any such vitriolic attack as that which the court directed against the attorney in *Offutt*. **(9b)** Nor is there any evidence that the judge abrogated his duty to impose his moral authority upon the proceedings. To the contrary, the record discloses considerable patience and control on the part of a judge faced with repeated impertinences of counsel. We conclude from the record before us that the trial judge was not required, as a matter of due process, to refer the matter of adjudication of the alleged contempt to another judge. (Cf. *Ungar* v. *Sarafite* (1964) 376 U.S. 575, 588 [11 L.Ed.2d 921, 930, 84 S.Ct. 841].)

III

Finally, petitioner contends that he has been denied the equal protection of the laws because California statutes do not provide for an appeal from, or for a stay of, an order adjudicating a person in contempt of court. The point of his argument is this: He assumes that "[t]he conviction . . . at issue . . . is a misdemeanor" (citing Pen. Code, § 166, subd. 1), but asserts that the court below "necessarily proceeded under the provisions of C.C.P. § 1209." **(11a)** Asserting that the right of appeal, if provided by the state, "must be fairly and equally available at all," petitioner argues that equal protection is denied him, since "[e]very convicted misdemeanant, except one convicted of contempt" obtains review by appeal. The contention is devoid of merit.

Petitioner was not convicted of violating Penal Code section 166 or any other section of the Penal Code. He was adjudged in direct contempt of court and his summary adjudication of contempt was proper under Code

of Civil Procedure section 1211.[28] (12) Although an order made in a contempt proceeding is not appealable (§ 1222; *John Breuner Co.* v. *Bryant, supra*, 36 Cal.2d at p. 878; *In re Civcosta, supra*, 219 Cal.App.2d at p. 785), it may be reviewed by certiorari or, where appropriate, by habeas corpus (*John Breuner Co., supra*; *Civcosta, supra*.) (11b) We have already outlined earlier in this opinion our scope of review and emphasized our responsibility to examine the record to the end of determining whether there is substantial evidence to support the judgment. These procedures afford petitioner the safeguard of a review of the proceedings below; he is not discriminated against merely because a conviction of criminal contempt under Penal Code section 166 may be reviewed by the usual appellate process.

The order to show cause is discharged and the petition for the writ is denied.

Wright, C. J., McComb, J., Burke, J., and Clark, J., concurred.

MOSK, J.—I dissent.

I begin by expressing sympathy for this able and considerate trial judge. Undoubtedly his patience was worn thin by what he believed, perhaps correctly, were the exasperating and dilatory tactics of petitioner attorney. As any judge with trial court experience realizes, there inevitably arises that one case in a thousand when the tensions of the argument and the overzealousness of counsel cause righteous anger to overcome normal tolerance and serenity.

If at that moment of humanly understandable rage the judge lashes out in response, the resultant contempt citation not infrequently fails to survive appellate review. That is the circumstance in the instant case. Analyzing the colloquy involved here, I would characterize it precisely as Justice Oliver Wendell Holmes, in his dissent, reacted to the newspaper articles involved in *Toledo Newspaper Co.* v. *United States* (1918) 247 U.S. 402 [62 L.Ed. 1186, 38 S.Ct. 560]: "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed

[28]Section 1211 states in relevant part: "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed."

the administration of justice in any sense that I possibly can give to those words."

In the span of nearly a quarter of a century between 1948 and 1972 there have been innumerable cases involving contempt citations, most of them factually distinguishable, some affirming trial court rulings, some reversing. Of all the cases which can be cited, however, I find the most relevant and persuasive to have been decided in those two years.

Justice Traynor wrote the decision for this court in *Gallagher* v. *Municipal Court* (1948) 31 Cal.2d 784 [192 P.2d 905]. In that case three jurors complained to the trial judge that a Mrs. Hill approached them in the corridor of the courthouse during the course of a trial. The judge undertook to examine into this alleged interference with jurors and placed one after another on the stand in order to obtain the facts. Attorney Leo Gallagher appeared and indicated he represented Mrs. Hill. When his attempt to cross-examine the jurors was refused because the court indicated he had no "place in here" during a mere investigation, Gallagher demanded: "You want a fair investigation, don't you?" He repeated a second time: "But you want a fair investigation?" A third time he said: "I know that, but you want a fair investigation?" He reiterated once more: "Don't you want a fair investigation of this?" And finally, he undertook to interrogate the court, asking whether his client was under arrest and demanding: "Will you kindly answer that question, Judge, whether she is under arrest at this time? Won't you hear my argument?"

The trial court found that the statements had been made in a "loud, insolent, aggressive, belligerent, boisterous, harsh, offensive and contemptuous tone of voice and with a sneering and contemptuous expression on his face and a threatening demeanor toward said court and the judge thereof and in disobedience of the lawful orders of the court, and in a disorderly and insolent manner toward the judge of said court." The court further found that the conduct "did interrupt the due course of said trial and did obstruct the administration of justice and interfere with the orderly proceedings of the court."

Despite the foregoing fulsome finding, much more pejorative in description than that in the instant order, this court found that there was "nothing contemptuous in petitioner's words and nothing in the record to show that his conduct tended to interrupt the due course of the examination," and that petitioner was merely an attorney who had been "regularly and faithfully representing the interests of his client."

In his opinion in *Gallagher* Justice Traynor pointed out: "Another consideration is the fundamental interest of the public in maintaining an independent bar. Attorneys must be given a substantial freedom of expression in representing their clients. 'An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case.' (Oswald, Contempt of Court (3d ed.), pp. 56-57. See, *People* v. *Rongetti*, 344 Ill. 107, 122 [176 N.E. 292].) The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements.

"An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling. . . . The heat of courtroom debate, particularly where liberty is concerned, often gives rise to persistence on the part of counsel." (*Id.* at pp. 795-796, 797.) To the same effect is *Raiden* v. *Superior Court* (1949) 34 Cal.2d 83 [206 P.2d 1081], in which a contempt citation was annulled where the attorney asserted the trial judge's order "defeated the ends of justice."

Gallagher's persistent inquiries about a fair investigation undeniably implied that the court was conducting an unfair investigation; yet he was exonerated. His comment was remarkably comparable to petitioner's statement in the instant case that "This court obviously doesn't want to apply the law," a similar implication that the court was conducting an unfair trial.

In 1972 the United States Supreme Court decided *In re Little*, 404 U.S. 553 [30 L.Ed.2d 708, 92 S.Ct. 659]. While the precise words are not given in the text of the opinion, the Supreme Court found "Petitioner made statements that the court was biased and had prejudged the case." The trial court's order recited that the court felt " '[T]hese remarks were very disrespectful and tended to subvert and prevent justice . . . that they reflected on the integrity of the Court and tended to subvert and prevent justice.' " (*Id.* at p. 554 [30 L.Ed.2d at p. 710].)

The high court found that the petitioner, acting in pro. per. as his own counsel, was entitled to latitude in conducting his defense and in vigorously espousing his cause. The court cited *Craig* v. *Harney* (1947) 331 U.S. 367, 376 [91 L.Ed. 1546, 1552, 67 S.Ct. 1249], that the "law of contempt is not made for the protection of judges who may be sensitive . . . . Judges are supposed to be men of fortitude, able to thrive in a hardy climate." The court also recalled the words of caution in *Brown* v. *United States* (1958) 356 U.S. 148, 153 [2 L.Ed.2d 589, 596, 78 S.Ct. 622, 72 A.L.R.2d 818], that trial courts "must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."

The allegations of *Little* that his trial court was biased and had prejudged the case are far more damning of the judge and the judicial process than the remark of this petitioner that the court did not want to apply the law.

The majority make the heroic declaration that petitioner's statement about the court not wanting to apply the law "was contemptuous on its face" (*ante*, pp. 250 and 254-255). I must respectfully disagree. There are, on occasions, perfectly valid reasons for a court to decline "to apply the law." The judge may believe "the law" has in effect been overruled, that it is anachronistic and no longer relevant or enforceable, that it violates contemporary constitutional principles, that it is oppressive or discriminatory in application. I do not suggest this petitioner had such reservations in mind. Nevertheless I do not believe we can, *ipse dixit*, declare petitioner's bare words to be opprobrious, demeaning or contemptuous per se. In short, there are many tolerable interpretations of those precise words.

Since the words are not actionable per se, the fundamental question here is whether the petitioner was, by virtue of that utterance and in the context in which it was said, guilty of disrupting or obstructing the judicial process. I do not believe he was.

First, the colloquy occurred outside the presence of the jury. Thus it could have no influence upon the trier of fact, and did not affect the course of justice in the fact-finding process.

Second, the demand of petitioner to pursue discovery through the person of the prosecutor, though perhaps overly dramatic, was not wholly untenable in the light of this court's decision in *In re Ferguson* (1971) 5 Cal.3d 525 [96 Cal.Rptr. 594, 487 P.2d 1234]. He was entitled to argue the point earnestly.

Third, nothing in the record before us reflects any unusual tone of voice, or boisterous or menacing conduct by the petitioner. In this respect the

order of the trial court is less supportable than that which we reversed in *Gallagher*.

Fourth, while the trial court stated in the contempt order that the statement "tended to interrupt the due course of the trial then in progress" the court fails to describe how a mere one-sentence *statement*, in the context of a discussion, albeit heated, over a point of law, and as distinguished from *conduct*, could in fact interrupt the proceedings. The entire episode was concluded in a matter of seconds, and it did not in actuality interrupt, disturb, delay, or in any manner affect the trial or its result.

Finally, I find it impossible to interpret petitioner's apology, rendered after overnight contemplation, as confirming or aggravating the purported contempt. I fail to discern anything in the words of counsel other than a modest effort to express contrition for having offended the court. For the trial judge to perceive in the attempted apology an exacerbation of the original offense suggests, as of that time, an unfortunate departure from judicial objectivity.

The apology issue was referred to in the most celebrated contempt case in California history, involving Stephen J. Field, found in the very first volume of California Reports (*People* v. *Turner* (1850) 1 Cal. 152). Justice Bennett, one of the original three justices of the Supreme Court, wrote (at p. 153): "The power thus vested in a court is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct." (See Mosk, *Direct Contempt* (1956) 31 State Bar J. 510, 523.)

There is no doubt that a trial court must deal with both obstruction and disruption of a trial by therapeutic use of the contempt power. Where nothing more than disrespect or discourtesy is involved, however, the dangers of abuse of the contempt power generally outweigh the benefits of using that weapon. The readiness of some judges to find contempt in conduct susceptible of various interpretations, and the capacity of others to provoke an unseemly response by their own imperious behavior on the bench, suggest the dangers of abuse. It must be emphasized that mere personal insult or irritating conduct should not be confused with legally contemptuous behavior. The nature of the trial as constructive human effort to reach a just result must be preserved and enhanced, and no person, whatever his role, should create by his conduct an atmosphere that makes

is impossible. But personal discourtesy, even insult, is on a relatively trivial plane in the whole scheme of things, and a certain amount should be tolerated when it falls short of actually interfering with the proceedings of the trial. (Note, *Contempt of Court* (1971) 56 Cornell L.Rev. 183, 208.)

Some opinions speak of contempt in terms of lessening the dignity of the court. (See, e.g., *People* v. *Gholson* (1952) 412 Ill. 294 [106 N.E.2d 333, 335].) On that subject Professor Max Radin said: "Judicial dignity is an important element of our system and serves a real legal function." But, he added, "It is, however, not a legal duty to be well mannered and it may even be said that it would be unconstitutional to make it one. . . . [T]here is no reason why the dignity of the court should take such dimensions or assume such a character that it demands awe or veneration." (Radin, *Freedom of Speech and Contempt of Court* (1942) 36 Ill.L.Rev. 599, 610.)

I would issue the writ.

Tobriner, J., concurred.

[Oct. 1973]

FILED

SEP 28 1972

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHARLES THOMAS MALLOY, Defendant.	No. C-27896 ORDER COMMITTING LAWRENCE BUCKLEY, ATTORNEY, FOR CONTEMPT

It is hereby found, ordered and adjudged that:

(1) On September 19, 1972, in the immediate presence and view of the Court, during proceedings in the above-entitled action, Lawrence Buckley counsel for defendant, stated in open court that the Trial Judge "obviously does not want to apply the law", in a colloquy the full portion of which is attached hereto and made a part hereof.

(2) Such statement in effect accused the Trial Judge of lack of integrity, tended to interrupt the due course of the trial then in progress, and constituted contemptuous behavior.

(3) For said contempt, said Lawrence Buckley is hereby committed to the custody of the Sheriff of Orange County for Five days and is hereby fined the Sum of Five Hundred Dollars ($500.00), plus penalty assessment. For nonpayment of said fine, said Lawrence Buckley shall serve, in addition to said five days, one day for each $25.00 of said fine remaining unpaid; except that, if the County of Orange owes or shall owe said Lawrence Buckley any monies, and if the County of Orange shall, with the consent of said Lawrence Buckley, deduct from any said sums

owed to Lawrence Buckley any portion of said fine, and if County of Orange shall, with like consent, treat such deduction as an extinguishment to that extent of any monies owing to said Lawrence Buckley, said deduction shall constitute payment of said fine.

(4) After said contempt, said Lawrence Buckley said he "apologized" and respected the Court's knowledge of the law. Such purported "apology" served only to emphasize the previous attack on the integrity of the Court, which in effect, charged the Court with knowing the law and deliberately refusing to obey it. The transcripts regarding said apology are also attached hereto and made a part hereof. HSH

(5) A stay of only those provisions of this order committing the said Lawrence Buckley to the custody of the Sheriff of Orange County is granted until verdict is rendered or the jury discharged in the above-entitled proceedings.

(6) A further stay of only those provisions committing said Lawrence Buckley to the custody of the Sheriff of Orange County shall be granted upon the institution by said Lawrence Buckley of appropriate proceedings to review the within adjudication of contempt in a higher court and upon posting of bail in the sum of One Thousand ($1,000.00) Dollars.

DATED: September 20, 1972

Herbert S. Herlands
Judge of the Superior Court

FILED IN THIS OFFICE
DEC 19 1972
WILLIAM A. SHARP
County Clerk and Clerk of the Superior Court of the State of California in and for the County of Orange
By Martha Deed Deputy

Cadan Dun

December 18, 197

ORDER DENYING REHEARING

CRIM. No. 16621

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE BUCKLEY ON HABEAS CORPUS

SUPREME COU

FILED

NOV 28 1973

C. F. BICHEL, C

Petition for rehearing DENIED.

Tobriner, J., and Mosk, J., are of the opinion that the petition should be granted.

C. F. BICHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this

DEC 18 1973 day of A.D. 19

Clerk

By Deputy Clerk

Wright

Chief Justice

APPENDIX D

STATUTORY PROVISIONS

California Code of Civil Procedure:

§ 1209: The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to,

remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings.

§ 1218: Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both; provided, however that in justice courts the judge may punish by fine or imprisonment or both, such fine not to exceed, in any case, one hundred dollars ($100), and such imprisonment one day; the conviction, specifying particularly the offense, and the judgment thereon, must be entered in the docket.

No party, who is in contempt of a court order or judgment in a divorce or separate maintenance action, shall be permitted to enforce such order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. This restriction shall not affect nor apply to the enforcement of child support orders.

§ 1222: The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

Source: Deering's California Codes (annotated), Civil Procedure §§ 1102-1248 (1973), pp. 278-279, 393-394, 411.

California Penal Code:

§ 166: Criminal contempts. Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any court;

4. Willful disobedience of any process or order lawfully issued by any court;

5. Resistance willfully offered by any person to the lawful order or process of any court;

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or when so sworn, the like refusal to answer any material question;

7. The publication of a false or grossly inaccurate report of the proceedings of any court;

8. Presenting to any court having power to pass sentence upon any

prisoner under conviction, or to any member of such court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code.

§ 1272: Admission to bail on application for probation or on appeal. After conviction of an offense not punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail:

1. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing a fine only.

2. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing imprisonment in cases of misdemeanors.

3. As a matter of discretion in all other cases.

§ 1466: Decisions from which appeal may be taken. An appeal may be taken from a judgment or order of an inferior court, in a criminal case, to the superior court of the county in which such inferior court is located, in the following cases.

1. By the people:

(a) From an order or judgment dismissing or otherwise terminating the action before the defendant has been

placed in jeopardy or where the defendant has waived jeopardy;

(b) From a judgment for the defendant upon the sustaining of a demurrer;

(c) From an order granting a new trial;

(d) From an order arresting judgment;

(e) From any order made after judgment affecting the substantial rights of the people.

2. By the defendant:

(a) From a final judgment of conviction. A sentence, an order granting probation, or a conviction in a case in which before final judgment the defendant is committed for insanity or is given an indeterminate commitment as a mentally disordered sex offender shall be deemed to be a final judgment within the meaning of this section. The conviction of a defendant committed for narcotics addiction shall be deemed to be a final judgment within the meaning of this section 90 days after such commitment. Upon appeal from a final judgment or an order granting probation the court may review any order denying a motion for a new trial.

(b) From any order made after judgment affecting his substantial rights.

Source: Deering's California Penal Code (1973 ed.) pp. 24, 325, 380.

APPENDIX E

CONSTITUTIONAL QUESTIONS RAISED BELOW

This case, due to somewhat unusual circumstances, has traversed a rather tortuous path in the state courts, and explanation of the course traveled may be of aid in this branch of the petition.

The adjudication of contempt occurred on September 19th, a Tuesday. California law (C.C.P. § 1211) requires that imprisonment for a summary contempt be supported by a written order reciting the facts upon which the ultimate finding rests. The written order filed in this case, entitled "Order Committing Lawrence Buckley, Attorney for Contempt" (Appendix B, supra, pp. 66-67) was, according to the order itself, signed by the judge on September 20th. A copy of the order was served on petitioner on September 21st, at which time the bailiff was ordered to take the petitioner forthwith into custody. Although no record of it is available, counsel has been advised by John Bovee, an attorney who represented a co-defendant in the underlying criminal case, that Mr. Bovee shortly thereafter contacted the presiding justice of the intermediate appellate court, explained the facts by telephone, and was advised that the appelate court would not grant any emergency relief. Mr. Bovee therefore prepared a printed form petition for habeas corpus which was filed in the California Supreme Court the following day, Friday, September 22nd. The trial judge, after requiring proof by affidavit from Mr. Bovee of the filing of that petition, ordered a stay of the imprisonment imposed by the

commitment order, pending termination of appellate proceedings. Petitioner was released under the terms of that stay after posting bail and has remained at liberty under extensions thereof, the last of which extends to January 4, 1974. An informal agreement has been reached with the prosecuting attorney and the trial judge whereby that stay will, on January 4, 1974, be extended to January 14, 1974. That agreement will doubtless be carried out.

Present counsel entered the case by filing a supplemental legal memorandum with the California Supreme Court on October 10, 1972. That memorandum challenged the conviction on due process grounds, citing In re Little (1972) 404 U. S. 553, and further challenged the conviction on due process grounds, citing Mayberry v. Pennsylvania (1971) 400 U. S. 455. That petition was transferred by the California Supreme Court to the Court of Appeal, Fourth District, Division Two. The Court of Appeal denied the petition without opinion on November 14, 1972.

A second petition for habeas corpus was then filed with the California Supreme Court. That court on December 13, 1972, issued an order to show cause why the writ should not issue. The case was placed on the court's calendar for argument. The opinion which followed is the one sought to be reviewed in this Court.

Thus, the first opportunity to raise the constitutional claims sought to be reviewed was the second petition for habeas corpus which was filed in the California Supreme Court. That petition

alleged, as two separate grounds, due process deprivations under Little and Mayberry. Pages 13-17 of that petition are appended setting forth those claims. In addition, the equal protection claim made in this petition relative to a stay pending appellate review was advanced in that petition. Pages 18-20 thereof are appended to this petition.

Finally, the proposition that this contempt conviction rested on an "inherent power-common law" theory first entered the case when the opinion of the California Supreme Court was filed and released. Neither the petition nor the two answers nor the two returns which were filed contain any mention of such a theory. Indeed, the answer filed on behalf of the trial court urges at some length that the Code provisions were applicable. (pp. 17-19, 22, 33.)

Counsel, who argued the case before the California Supreme Court, has no recall of any mention of an "inherent power-common law" theory during argument before that court and does not believe that it was advanced.

Petitioner filed a petition for rehearing which raised the ex post facto-due process claim made in this petition, citing Bouie v. Columbia (1964) 378 U. S. 347. Pages 18-20 of that petition are appended. Under the circumstances that appears to be the first possible time that those claims could have been raised.

had had an inning at raising petitioner's adrenalin level. (See Volume I, p. 3, lines 6-7; pp. 3-4, line 14-line 5.)

The United States Supreme Court has made it clear that a charge of contempt which rests on interrupting or disrupting court proceedings must, as a matter of due process, rest on some sort of conduct which in fact disrupts the proceedings. Re Little (1972) ___ U. S. ___; 30 L. Ed. 2d 708, 711. As the Court there said:

> "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. (Citing cases.) 'Trial courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."

In Little the petitioner had, in summation at the close of trial, made statements that the court was biased and had prejudged the case and that petitioner was a political prisoner. It would seem that those statements are, on their face, a good deal more suggestive of a lack of integrity in the court than is the lone statement involved in this case. Obviously, if that is correct, then it would appear that as a matter of law no contempt was committed in this case. And on that point, it bears emphasis that the statement involved in this case does not even directly accuse the trial judge of any lack of integrity, although it may be so interpreted. Fairly, the statement made by the petitioner here may be in-

-13-

terpreted to be an expression by the petitioner that the court did not want to rule in his favor but might or would if presented with case authority which required it. Certainly every court has found itself countless times faced with wanting to rule for one party or the other but required by statute or case authority to rule otherwise. It is not urged here that the foregoing is necessarily the purport of the remark; rather, it is only observed that the remark is open to an interpretation other than the one which was given to it by the trial judge.

The Court of Appeals in In re Grossman (1972) 24 Cal. App. 3d 624, 637; ___ Cal. Rptr. ___, reaches essentially the conclusion urged in this petition. The words involved there (in the second of three counts of alleged contempt) were:

"unless there's a different rule for him than for me."

24 Cal. App. 3d 635.

That language seems to clearly enough charge bias of the trial judge. Acting under an order to show cause issued by this Court, the Court of Appeal held that those words, without more, were insufficient under Little to support a contempt commitment. 24 Cal. App. 3d 637. However, the order of commitment in Grossman, unlike the case at bar, also recited that the statement was made in a "loud, disorderly, contemptuous, insolent and rude manner and tone of voice." 24 Cal. App. 3d 638. The Court of Appeal therefore affirmed the finding of contempt, but made it clear that the

quoted finding and the interruption in fact of the jury proceedings which were involved there were essential elements of the order of affirmance.

Finally, as to the content of the language in issue, it seems difficult to distinguish this case from Gallagher v. Municipal Court (1948) 31 C. 2d 784, 786; 192 P. 2d 905. The primary ground of decision in Gallagher was failure of the trial judge to warn the attorney of his demeanor, facial expressions and tone of voice where those items are relied upon in support of the commitment. Nevertheless, in that case, the attorney four times over asked the trial judge whether or not the judge wanted a fair investigation of a charge of jury tampering, thus clearly implying that the investigation being conducted by the judge was not a fair one. This Court specifically held that there was nothing contemptuous in the words used. 31 C. 2d 789.

For the above reasons, it is respectfully urged that the order of commitment in this case does not, as a matter of law, state facts sufficient to constitute a contempt and a writ should issue annulling the order of the trial court.

II. The trial judge was required, as a matter of due process, to refer the matter of adjudication of the alleged contempt to another judge.

Mayberry v. Pennsylvania (1971) 400 U. S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499, holds squarely:

"Our conclusion is that by reason of the Due Process

Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." 400 U. S. 466.

ear though the holding seems to be, there is some room for ' ubt that it applies to every case. This follows from the atement of the Court, made in the paragraph preceding the otation above, to the effect that not every attack made on judge will disqualify him from sitting. The Court of Appeal, Grossman, supra, has interpreted that to mean that Mayberry plies only to those situations where the judge has become "personally embroiled" with the lawyer that he does not pear to be capable of judging the lawyer's conduct impar- ally. 24 Cal. App. 3d 632. Although it is urged that the terpretation of the Court of Appeal is erroneous, that ques- on does not seem to be of particular significance in this se, for it can be demonstrated that the judge involved here clearly so "personally embroiled" as to come within the ohibition of Mayberry in any event.

The remarks of the trial judge, even the limited atement thereof quoted in the statement of facts in this morandum, are certainly not representative of an impartial biter. "I didn't know you went on forever," is hardly the atement of a willing listener. And although the remarks the judge were made after the contempt adjudication, some ight into the pressures which existed at the time is gained m the remarks made on the record in the Lebhar case.

It serves no very useful purpose in this memorandum to again quote those remarks other than to observe that the judge was firmly convinced that the petitioner was consciously engaged in a "cunning, shrewd and deliberate attempt" to thwart the "extraordinary effort" of the judge to conclude the case. It is apparent from those remarks that the trial judge was very distinctly and deeply concerned with the fact that the trial had taken longer than anticipated and that, as a result, it had come into conflict with a murder case which was in progress and which was ready to resume. It should be noted that the prosecutor in Malloy was also the prosecutor in Lebhar. [V:2] It is equally apparent that the trial judge laid the delay in the Malloy case squarely at the door of the petitioner. Finally, it is suggested that the rather remarkable interpretation which the trial judge accorded to the apology tendered him by the petitioner must be viewed as the most persuasive sort of evidence that this judge was clearly so "personally embroiled" in the proceedings with the petitioner as to clearly require, under Mayberry, that a charge of contempt be adjudicated by another judge.

For the above reasons, it is respectfully suggested that adjudication of the charge in this case worked a denial of due process and that a writ of habeas corpus should issue annulling the commitment and remanding the case for trial before another judge if the Court concludes that a colorable contempt has been shown at all.

III. The California statutory scheme, which does not provide for appeal from or a stay of a contempt adjudication, works a denial of equal protection.

Griffin v. Illinois (1956) 351 U. S. 12, 17, makes it clear that:

"Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"

And although one may wonder about the vitality of the case in light of contemporary standards of due process and equal protection, the federal Supreme Court has held that the Constitution does not compel the states to provide any means of appeal at all. McKane v. Durston (1894) 153 U. S. 684. But, putting to one side any question of the vitality of McKane, the Court has made it amply clear that if a state elects to provide a right of appeal, that right may not be grudgingly parceled out to an arbitrarily limited class of litigants. Rather, if a state provides a right of appeal, it must be fairly and equally available to all.

"This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

Rinaldi v. Yeager (1966) 384 U. S. 305, 310.

The conviction which is at issue in this petition is a misdemeanor. Penal Code § 166 (1). And while it is true that the Superior Court in this instance necessarily proceeded under the provisions of C. C. P. § 1209 [In re McKinney (1968) 70 C. 2d 8, 13; 73 Cal. Rptr. 580], the proceeding itself is of "criminal nature and summary character." Hotaling v. Superior Court (1923) 191 Cal. 501, 504; 217 Pac. 73.

Every convicted misdemeanant, except one convicted of contempt, is entitled as of right to a review of his conviction. Penal Code § 1466 (2) (a). Every convicted misdemeanant, except one convicted of contempt, is entitled as of right to a stay pending review of his conviction. Penal Code § 1272 (2). Absent a knowing and intelligent waiver, no person, except one convicted of contempt, may be imprisoned unless he was represented by counsel at his trial. Argersinger v. Hamlin (1972) ___ U. S. ___, 32 L. Ed. 2d 530, 538.

It is worthy of emphasis that this petition does not challenge the right of a judge to restrain one who physically disrupts courtroom proceedings; it does not challenge the right of a judge to forcibly restrain one who immediately threatens the conduct of courtroom proceedings; it does not challenge the right of a judge to use those measures which may be necessary to maintain order in his courtroom at the time. See Illinois v. Allen (1970) 397 U. S. 337. It does challenge the right of a judge to impose immediate, non-

appealable punishment for a past act.

The problem presented by this branch of this petition has recently been dealt with in Bell v. Hongisto (8-16-72) 346 F. Supp. 1392 (U. S. D. C. N. Cal.). The lawyer-defendant involved there had been held in contempt for refusing to proceed with the trial of a criminal case after the court had ordered him to proceed. Unlike this case initially, the contempt sentence had been stayed for the time necessary to seek habeas corpus relief in the state courts. His petitions having been denied in the state courts, a substantial part of the contempt sentence had been served before he was ordered provisionally released by the federal Court. That Court held that the unavailability to a contemnor of any avenue of relief except by way of the narrowly-limited writ of habeas corpus worked a denial of equal protection and therefore granted its writ of habeas corpus.

For all of the foregoing reasons, it is respectfully urged that the statutory scheme upon which the commitment of this prisoner rests is in conflict with the Fifth and the Fourteenth Amendments to the United States Constitutions and Article I, §§ 11 and 13 of the Constitution of the State of California.

has been the target of one remark which he construes, beyond any practical power of review, to have impugned his integrity. In so doing the Court silently overrules the underlying rationale of both Gallagher v. Municipal Court (1948) 31 C. 2d 784, 795, 797, and In re Hallinan (1969) 71 C. 2d 1179, 1181. The decision, it is respectfully urged, is not supported by the authorities cited or by any others.

c) Due process principles are offended when a contempt conviction purportedly entered under statutory authority is affirmed on a common law theory.

It seems amply apparent that the trial judge, in the commitment order filed in the case, believed that he had proceeded and was proceeding under the provisions of CCP § 1209 (1):

> "(2) Such statement in effect[3] accused the Trial Judge of lack of integrity, tended to interrupt the due course of the trial then in progress, and constituted contemptuous behavior." (Emphasis added.)

The code section, of course, uses identical language:

> ". . .tending to interrupt the due course of a trial . .."

This Court, in its decision, apparently concluded that the order of the trial court had been made under subdivision 1 of CCP § 1209 as suggested above. [12, fn. 13] This Court

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3 By use of the words "in effect" the trial judge appeared to recognize that he was construing ambiguous language. Despite that fact, the decision characterizes the statement as "contemptuous on its face." [19]

also observed that the record does not show that any recess or interruption of the proceedings was in any way a result of petitioner's remark. [7, fn. 6] Even the dissent agrees on that point. [Diss. 8] Thus, on its face, the record does not support the order the trial judge thought he was making.

Clearly, subdivision 1 of CCP § 1209 requires three elements as support for its application:

1) Disorderly or insolent behavior;

2) toward the judge;

3) tending to interrupt the due course of a trial or other proceeding.

In its decision, the Court concludes that proof of the third element is not necessary. [15-16, fn. 14] Gillen, which was apparently overruled 25 years ago, appears to be the only published case which lends some support to this rather startling departure.

In effect, that departure is indistinguishable from the situation which is presented when an arguably criminal act is committed and thereafter, but prior to trial for that act, the legislature amends the applicable statute so as to remove the necessity for proof of one element of the crime as previously defined. Such an act of the legislature, as it may be applied to trial of that defendant, is void as an ex post facto law under both federal and state Constitutions. Art. I, § 16, California Constitution; Art. I, § 10, cl. 1, U. S. Constitution; DeWoody v. Superior Court (1970) 8 Cal. App. 3d 52, 56.

There would seem to be no difference between the act of the legislature which removes the necessity for proof of an element of a crime and the holding of a court of last resort which, by interpretation, declares, necessarily retrospectively, that proof of one element of a statutorily defined crime[4] is not necessary. And that is precisely the conclusion which has been reached by the United States Supreme Court:

> "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10 of the Constitution forbids."
>
> . . . . .
>
> "If a state legislature is barred by the Ex Post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Bouie v. Columbia (1964) 378 U. S. 347, 353.

In Bouie, a southern restaurant sit-in case, the petitioner entered the restaurant, was ignored for service, was then ordered to leave, and upon refusal was arrested for trespassing. The statute under which he was convicted declared it a misdemeanor to enter the lands of another after notice prohibiting such entry. The Supreme Court of South

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4 "To adjudge a party guilty of contempt of court, for which he is fined and imprisoned, is to adjudge him guilty of a specific criminal offense." Ex parte Hollis (1881) 58 Cal. 405, 408; accord, Ex parte Gould (1893) 99 Cal. 360, 362.